89-867

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,
Petitioners,

v.

HARZA ENGINEERING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a foreign government purports to confiscate a debt owed to one of its nationals by an American company with no assets in the confiscating country, so that the debt could not be converted to cash in the confiscating country, does the Act-of-State Doctrine compel recognition of the confiscation?

2. Where a court is asked to dismiss a contract case between two private parties on the ground that the lawsuit may adversely affect the foreign relations of the United States, may the court refuse to adjudicate the case on that ground in the absence of any expression of the Executive Branch's views?

RULE 28.1 LIST

For Petitioner F. & H.R. Farman-Farmaian Consulting Engineers Firm:

Parent: none

Subsidiaries (other than wholly-owned subsidiaries): none

Affiliates: The shareholders of petitioner F. & H.R. Farman-Farmaian Consulting Engineers Firm also owned all but one share of another confiscated Iranian firm, COMIRAN Consulting Engineers.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. Petitioners suggest that the Court hold this petition until it rules in *W.S. Kirkpatrick* v. *Environmental Tectonics*, No. 87-2066.

OPINIONS BELOW

The opinion of the court of appeals is reported at 882 F.2d 281; it is reprinted in the Appendix to this Petition (App. 1a). The opinion of the district court, not reported, is reprinted in the Appendix (App. 14a).

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1989 (App. 12a). A timely petition for rehearing was denied on September 20, 1989 (App. 13a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners are an Iranian engineering firm (the Firm) and its managing director. Their suit was dismissed by the district court because of the Act-of-State doctrine, and the court of appeals affirmed the dismissal. Petitioners contend that the court below misapplied the doctrine and also erred in not seeking the views of the Department of State before concluding that allowing the case to proceed "would be a slap in the face of the Iranian regime" (App. 10a).

Respondent (Harza) is a consulting engineering company based in Chicago. In 1964, it entered into a "Collaboration Agreement" with the petitioner Firm for assistance in securing and carrying out contracts with Iranian government agencies. The Agreement provided that it was governed by the law of Illinois.

Major public works contracts were awarded to Harza. The Firm handled liaison between Harza and the contracting agencies and also provided staff and facilities in Iran and performed other consulting engineering services in Iran and Chicago. As provided in the Collaboration Agreement (including later supplements), the Firm's compensation was of several kinds: (a) various percentages of Harza's revenues, with certain funds to be deposited in a specific account in a Chicago bank in which the Firm had "an interest"; (b) sharing of profits and losses on certain projects; and (c) cost-plus reimbursement of certain expenses, including a specific *per diem* for services performed outside Iran by the Firm's principals (Complaint (R.1), Exh. A.2 Arts. IV.D and IV.G; Exh. A.5). Some payments were made in dollars, others in Iranian rials (*id.*, Exh. A.2 Art. IV.F; Exh. A.3; Exh. A.6 ¶ 4; Letters of Agreement attached to Hastings Aff. (R. 40)). All billing, accounting and other financial records were maintained by Harza in Chicago, and the

Firm's invoices were sent to Chicago (App. 2a; Declaration of Farough Farman-Farmaian (R. 29), ¶ 3; *see* R. 1, Exh. A.2 Arts. IV.E and V.H).[1]

By the time of the revolution in Iran in 1979, Harza had completed essentially all of its work in Iran and had left the country entirely. *Harza* v. *The Islamic Republic of Iran*, 11 Iran-U.S. Claims Tribunal Reports 76, 82, 129 (1986). On August 6, 1979, the revolutionary government appointed a "temporary director" to run the Firm, and in 1981 the government decreed that the Firm should be dissolved and a "Board of Liquidators" appointed.[2] *No compensation has ever been paid to the owners of the Firm for this seizure of the Firm by the Iranian government* (App. 3a).

In November 1981, Harza filed with the Iran-United States Claims Tribunal its claim for work that had been completed before it left the country and for which it had never been paid. *Harza* v. *Iran*, 11 Iran-U.S. Claims Tribunal Reports at 77-78. The Firm's managing director worked with Harza's executives and counsel in Chicago in assembling the claim, and the evidence submitted to the Tribunal included invoices for substantial amounts owed to the Firm for its work (Declaration of Farough Farman-Farmaian, ¶ 13). After an evidentiary hearing,

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[1] In certain respects, the bi-national nature of the parties' relationship is disputed by Harza, particularly with regard to the timing, duration and reasons for trips the co-petitioner made to Chicago. To support its position on the Act-of-State doctrine, Harza attempted to show that the parties' relationship had no "connection" with the United States. It was and is petitioners' position, however, that a court may not resolve factual disputes in favor of a party who has moved for summary judgment. *See, e.g., United States* v. *Diebold*, 369 U.S. 654, 655 (1962). As to these factual disputes, therefore, we rest on the contract documents and the declaration of the petitioner managing director. Under the legal test the lower courts should have followed, these factual disputes are not material.

[2] No liquidation of the Firm has been carried out.

Harza was awarded approximately $8.4 million, *Harza* v. *Iran*, 11 Iran-U.S. Claims Tribunal Reports at 137, which was duly paid to it, as is customary, by funds drawn on the Federal Reserve Bank of New York, *see* 47 Fed. Reg. 25243-44 (1982). *At no time during the Tribunal proceedings did the Iranian government, despite its previous confiscation of the Firm, make any counterclaim or demand any setoff for the portion of the claim that was attributable to the Firm's work. See Harza* v. *Iran, supra.*

When the petitioner's managing director asked Harza for the Firm's share of the Tribunal award, Harza refused to pay, citing the confiscation of the Firm by the Iranian government. Harza had never before taken that position.

Petitioners thereupon brought suit in the United States District Court for the Northern District of Illinois, invoking the court's diversity jurisdiction, to recover approximately $2 million under the Collaboration Agreement. Harza moved to dismiss or for summary judgment on the ground that the confiscation of the Firm's assets, including Harza's debt to the Firm, must be recognized by the court under the Act-of-State doctrine.[3] The district court granted the motion for summary judgment and dismissed the complaint. In so doing, it found, contrary to the Firm's contentions (and evidence), that "the United States has no connection to the relationship except that [Harza] has an office here" (App. 27a).

The court of appeals, in an opinion by Judge Posner, affirmed. It acknowledged that, in view of the confiscatory nature of the Iranian government's seizure of Harza's debt to the Firm, the Act-of-State doctrine would

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[3] The complaint and the summary judgment papers are reprinted in a major reporter on Iranian claims, 2 Mealey's Litigation Reports-Iranian Claims 641-42, 653-90 (July 3, 1987). The Iranian government has not sought in any way to intervene in this case.

not bar the suit if that seizure "could not be completed within the territory of the foreign sovereign" (App. 3a). Petitioners had contended, citing several Second and Fifth Circuit decisions, that seizure of the debt could not be completed in the foreign territory if, as was the case here, the debt could not be reduced to cash in that territory because the *debtor* (Harza) had no assets there. The court below, however, held that seizure of the debt was complete in Iran because the "assets and operations" of the *creditor* (the Firm) were in Iran and "all the services under the contract were to be performed in the foreign country" (App. 9a).[4] Although the court acknowledged that it is "unlikely that the claim will ever be pressed" by Iranian government officials, it concluded that the Act-of-State doctrine required the court to avoid "stepping on the State Department's toes" and to recognize the confiscation lest it deliver "a slap in the face to the Iranian regime" (App. 10a-11a).[5]

Petitioners filed a timely petition for rehearing. They urged that a court should not conclude that adjudicating the case would adversely affect the foreign relations of the United States without first asking the State Department for its views, as petitioners had previously suggested. The court denied the petition without comment (App. 13a).

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision directly conflicts with decisions of other circuits as to the proper test for determining the situs of intangible property for purposes of the federal Act-of-State doctrine. The Seventh Circuit

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[4] Petitioners raised in the court of appeals its objection to resolving factual disputes in favor of a party (Harza) that has moved for summary judgment, but the court ignored the point.

[5] The court of appeals also raised *sua sponte* a question about whether the diversity jurisdiction of the district court had been properly invoked but decided, correctly, that it had been.

panel also erred in dismissing this action on the basis of a perceived impact on the foreign relations of the United States without any indication by the State Department that the suit would adversely affect the country's foreign relations. That is an issue that this Court now has under consideration.

I. THE SEVENTH CIRCUIT'S DECISION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF OTHER CIRCUITS AS TO THE APPLICATION OF THE ACT-OF-STATE DOCTRINE TO INTANGIBLE PROPERTY.

Confiscation of property by the state is, and has long been, "contrary to our public policy and shocking to our sense of justice and equity." *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N.Y. 369, 378, 189 N.E. 456, 460 (1934). *See Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661, 667 (2d Cir. 1988); *Maltina Corp.* v. *Cawy Bottling Co.*, 462 F.2d 1021, 1027 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972); *Republic of Iraq* v. *First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255, 259 (2d Cir. 1956).

For reasons of international comity and separation of powers, however, this Court has held that such confiscations, when perpetrated by foreign states *within their own territory*, must be given effect by United States courts. The Act-of-State doctrine, when it applies, prevents courts from questioning the validity of foreign confiscations, but the doctrine applies only insofar as the confiscations purport to affect property situated within the confiscating state's territory. When a foreign state purports to confiscate property situated beyond its territory, the doctrine has no application. The confiscating state's expectation of dominion over property situated outside its borders is attenuated and in any event is overridden by this nation's interest in protecting property situated here and the owner's expectation that his property situated in this country will be protected by this

country's laws and policies. *See, e.g., Maltina*, 462 F.2d at 1028-29; *Republic of Iraq*, 353 F.2d at 51-52.

The application of these principles to confiscations of tangible property is straightforward. In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), for instance, this Court held that the courts must give effect to Cuba's expropriation of sugar that was situated in Cuba's territorial waters when Cuba expropriated it. Cuba clearly had "dominion over the property" and thus its confiscation could be "fully executed within the foreign state." *Id.* at 414-15. But, if Cuba were to attempt to expropriate, say, a building in New York, the courts in this country would not be constrained by the Act-of-State doctrine to give effect to such a confiscation.

This case, however, involves intangible property—a debt owed to a foreign national by an American firm. The Second and Fifth Circuits have long held that the situs of a debt for Act-of-State purposes is with the *debtor*. *E.g., Republic of Iraq, supra; Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). More recently, however, the Ninth Circuit and the Seventh Circuit in this case have departed from this approach and have focused instead on the *creditor* and its activities.[6] This approach, as the Seventh Circuit appears to have recognized, significantly expands the scope of the Act-of-State doctrine. It therefore has the result of greatly extending the territorial reach of a foreign state's power to confiscate property and requires the courts of our country in a greater number of cases to lend their unquestioning assistance to states seeking to carry out such confiscations. There is thus a direct and irreconcilable conflict between the creditor-oriented test of the Ninth and Seventh Circuits and the debtor-oriented test followed in the Second and Fifth Circuits.

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[6] The Ninth Circuit case is *Tchacosh Co.* v. *Rockwell International Corp.*, 766 F.2d 1333 (9th Cir. 1985), which was followed by the Seventh Circuit in the decision below.

This Court has previously been made aware of the traditional debtor-oriented test, *see Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 687 (1976). On that occasion, the Court did not pass on its validity (having denied certiorari on the challenge to the use of the test, *id.* at 690 n.6). The Court has not had occasion in the last several decades to address squarely the application of the Act-of-State doctrine to confiscations of intangible property.

Without guidance from the Court, the lower courts will continue to render inconsistent holdings on this issue, reducing confidence in the ability of U.S. courts to vindicate property rights and creating uncertainty about the vulnerability to foreign seizure of debts owed by U.S. citizens or accounts in U.S. banks. Additionally, application of the novel approach adopted in this case will inevitably result in windfalls for certain classes of debtors like the respondent Harza.

A. The Conflict

1. *The Debtor-Oriented Test*

Applying a time-honored rule, our principal commercial courts of appeals have held, and continue to hold, that the situs of a debt for Act-of-State purposes is with the debtor. Traditionally, the situs of a debt for this purpose has been the state of the debtor's domicile or principal place of business. *See, e.g., Republic of Iraq, supra*; Restatement of Foreign Relations Law of the United States (Second) § 43 comment d (1965) ("Under the rules of conflict of laws normally applied in the United States, the situs of an intangible whose owner is domiciled outside the United States is the domicile of the debtor or issuer in the United States.").

The Second Circuit has long held that a debt's situs is with the debtor. As Judge Friendly explained in *Republic of Iraq, supra*, a debt cannot be said to be situated within

the expropriating state's territory for Act-of-State purposes if the debtor was domiciled and had its principal place of business in the United States and if it had no assets in the expropriating state at the time of the confiscation. 353 F.2d at 51. Under such circumstances, the foreign state does not have "dominion" over the debt because it is not in a position to "fully execute" its taking of the debt within its territory, *see Sabbatino*, 376 U.S. at 414-15, and the state is therefore forced to secure the assistance of the courts of this country to complete the taking. The Act-of-State doctrine does not require the courts of this country to allow themselves to be used by foreign states to effectuate their uncompensated takings. It requires acquiescence only in consummated takings. Other Second Circuit cases have reached similar results applying the debtor-oriented test, although sometimes describing the test in different terms.[7]

Likewise, the Fifth Circuit has long followed the rule focusing on the debtor and its contacts with the expropriating state. In *Tabacalera*, 392 F.2d at 715-16, the court echoed this Court's words in *Sabbatino*, 376 U.S. at 414-15, when it concluded that takings by a foreign government "are to be recognized under the Act of State Doctrine only insofar as they were able to come to complete fruition within the dominion of [the expropriating state]." The debt under consideration in that case was not situated within the territory of the expropriating

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[7] *See Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364-65 (2d Cir. 1973), *cert. denied in pertinent part*, 425 U.S. 991 (1976) ("For purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it. . . . [T]he power to enforce payment of a debt . . . generally depends on jurisdiction over the person of the debtor."); *United Bank Ltd.* v. *Cosmic International, Inc.*, 542 F.2d 868, 873-74 (2d Cir. 1976) (following *Menendez*); *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (following *Menendez*); *Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661, 666-67 (2d Cir. 1988) (domicile of the debtor dispositive).

state because that state was not "physically" in a position to "change . . . the form of the asset from an account receivable to cash," 392 F.2d at 716, presumably because the debtor had no assets in Cuba at the time of the expropriation. *See also Maltina Corp.* v. *Cawy Bottling Co.*, 462 F.2d 1021, 1025-27 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972).[8] In other words, under the test to which the Second and Fifth Circuits have long adhered, the focus is on the debtor and its ties to the confiscating state.[9] Courts in the United States simply do not, under that test, lend their aid to a foreign state's attempt to confiscate intangible property if the confiscation could not have been completed within the foreign state's territory. It makes

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[8] In a quite different kind of case, the Fifth Circuit has reached the same result employing a somewhat different test. In *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the debtors were Mexican banks in which American investors had made dollar deposits. The Mexican government promulgated exchange control regulations under which such deposits could be repaid only in Mexican pesos at specified exchange rates, which were unfavorable to the American investors. The Fifth Circuit held that the investors' suit against the banks was barred under the Act-of-State doctrine because the situs of the deposits was Mexico. *Id.* at 1121-25. The court believed that a modification of the traditional test was required in the context of the case because here "the situation is reversed: the foreign national is the debtor and the American national is the creditor." *Id.* at 1123. It therefore analyzed the "incidents of the debt" to determine whether the debt's ties to the foreign country were "sufficiently close that we will antagonize the foreign government by not recognizing its acts." *Id.* at 1124. Because the deposits were carried in Mexico, payment was to be made there, Mexican law was applicable, and the American banking system was not involved, the court concluded that the situs of the debts was with the debtor, *id.* at 1123-24—the same result it reached under the traditional rule. Neither the Seventh Circuit in this case nor the Ninth Circuit in *Tchacosh* relied on *Callejo* in formulating the test they applied to determine the situs of a debt owed by an American national to a foreigner.

[9] The courts in the Act-of-State context have uniformly rejected the rule sometimes applied in other contexts—that the situs of a debt is with the creditor. *See Menendez*, 485 F.2d at 1365.

no difference under this test that the creditor is not a United States national.[10]

Under this traditional rule, the Seventh Circuit would have had to conclude that the debt claimed by the Firm was situated outside Iran at the time of the purported expropriation: Harza, the debtor in this case, was domiciled and had its principal place of business in the United States and had no assets in Iran at the time of the expropriation. Iran therefore could not complete its confiscation of Harza's debt to the Firm within its own territory, and the court was not required by the Act-of-State doctrine to give extraterritorial effect to the confiscation.

2. *The Creditor-Oriented Test*

The Seventh Circuit in this case, however, adopted and applied a test focusing not on the debtor but on the confiscating state's relationship with the creditor and its activities that gave rise to the debt.

This new test was derived from the Ninth Circuit's recent decision in *Tchacosh*, 766 F.2d at 1337-39. At issue there was the Iranian government's purported expropriation of a debt owed by an American company to the Iranian plaintiff. The court expressly rejected the traditional debtor-oriented test because it believed that this test would render the Act-of-State doctrine a "nullity." 766 F.2d at 1338 n.6. This conclusion, however, was based on the court's fundamental misunderstanding of the test it rejected. The court apparently believed that the issue under the debtor-oriented test was whether *the U.S. courts* had jurisdiction over the debtor at the time suit was brought. *Id.* But, in fact, the question under that test is whether *the expropriating state* was in a position to exercise dominion over the debtor or its property at the

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[10] Many of the Second Circuit and Fifth Circuit decisions cited in this petition holding the Act-of-State doctrine inapplicable involved confiscations of the property of foreign nationals.

time of the confiscation. If it was, then the confiscation must be given effect even if a court in the United States had concurrent jurisdiction; if it was not, then the confiscation need not be given effect because the state was not in a position to "fully execute" the taking within its territory.

Having rejected the debtor-oriented test based on this misconception, the court in *Tchacosh* proceeded to adopt its polar opposite. Without grounding in case law or policy, the court shifted the focus of the inquiry from the *debtor* and its ties to the expropriating state to the *creditor* and its ties (or lack of ties) to the United States. Thus, the court held that the confiscatory act must be recognized because the creditor was a foreign national, its work and all invoicing and payment were all done in the foreign country, its contract was governed by the foreign state's law, and the debt's only connection to the United States was that the debtor was "incorporated under United States law and has a place of business in this country." 766 F.2d at 1338. Nowhere did the court explain why the factors it listed should have a bearing on the situs of the debt or on the principles that underlie the Act-of-State doctrine except to state that "the relations between [the creditor] and [the debtor] have a far greater impact upon Iran than upon the United States." *Id.*

Notwithstanding the faulty reasoning and lack of supporting authority of the *Tchacosh* decision, the Seventh Circuit in this case followed that holding. It perceived that the facts in *Tchacosh* were "almost identical to those of the present case," namely, that "the contemplated and actual operations of [the Firm] were confined to Iran," that the Firm "had no assets outside Iran," and that it "was seized in Iran pursuant to a locally valid Iranian law" (App. 9a, 11a). Obviously, however, this last "fact" regarding the lawfulness of the seizure under Iranian law is irrelevant, for (a) petitioners do not chal-

lenge the validity of the taking under Iranian law, but only its reach outside Iran, and (b) the contract between Harza and the Firm is by its terms governed by Illinois law. The second "fact" on which the Seventh Circuit relied—that the Firm "had no assets outside Iran"—merely begs the question *sub judice*; it has no bearing on the *resolution* of the question. The dispositive "fact" in Judge Posner's opinion, therefore, was that the creditor Firm's "contemplated and actual operations . . . were confined to Iran."

The Seventh Circuit's decision is in direct and irreconcilable conflict with the debtor-oriented rule. The Seventh Circuit acknowledged that the Second Circuit has rendered decisions that "look the other way" (App. 9a) (citing only *Bandes*, *supra*, and *United Bank*, *supra*), but it purported to distinguish those cases on the ground that "in each a shipment of goods to or from the U.S. was contemplated," whereas in this case "all services under the contract were to be performed in the foreign country" (App. 9a). This is not satisfactory. Neither the origin nor the destination of the purchased goods had any bearing on the reasoning of the court in either *Bandes* or *United Bank*. In fact, nowhere in the *Bandes* opinion is there any indication that the goods in question were shipped to or from the United States, and Judge Kaufman's opinion expressly gives the debtor's domicile as the basis of his conclusion: "H & J's Connecticut domicile places the situs of the H & J fund in the United States." 852 F.2d at 667. The court in *Bandes* cited three previous Second Circuit cases in support of this rule—including Judge Friendly's opinion in *Republic of Iraq*, which also gives no hint that the property involved in that case had anything to do with "a shipment of goods to or from the United States." *Id.*

In short, there is no way to reconcile the Ninth and Seventh Circuits' creditor-oriented approach with the debtor-oriented approach followed in the Second and Fifth

Circuits. The two approaches are squarely in conflict. Moreover, the twin effects of the rule of the Ninth and Seventh Circuits are (1) to expand greatly the application of the Act-of-State doctrine and (2) to give American debtors a windfall.

The subject matter is thus ripe for this Court's intervention.

B. The Significance of the Issue

As the cases cited above illustrate, the question of situs arises in Act-of-State cases with respect to numerous types of intangible property. The question has arisen in cases, such as this one, involving contractual or quasi-contractual debts. *Tabacalera*, *supra*; *Menendez*, *supra*; *Bandes*, *supra*. The question has arisen with respect to accounts receivable being held or collected by U.S. banks or agencies. *United Bank*, *supra*; *Rupali Bank* v. *Provident Nat'l Bank*, 403 F. Supp. 1285 (E.D. Pa. 1975). The question has arisen with respect to intellectual property rights, such as trademarks and copyrights. *Zwack*, *supra*; *Maltina*, *supra*; *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified on other grounds*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *F. Palicio y Compania, S.A.* v. *Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd* 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). And, perhaps most frequently in recent years, the question has arisen with respect to bank accounts or financial instruments. *Republic of Iraq*, *supra*; *Vishipco*, *supra*; *Garcia* v. *Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984); *Perez* v. *Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984); *Compania Ron Barcardi, S.A.* v. *Bank of Nova Scotia*, 193 F. Supp. 814 (S.D.N.Y. 1961).[11] The conflict among the circuits will thus affect

[11] A bank deposit, of course, is nothing more than a debt. *See Vladikavkazky*, 189 N.E. at 459.

cases involving all of the foregoing types of intangible property. Until the Court addresses the point, courts in two circuits will come out one way, courts in the other two circuits will come out the opposite way, and other courts will have to choose between the two conflicting approaches.

The issue also arises in contexts other than outright expropriation by a foreign state. Of course, takings short of outright expropriations have long been the subject of litigation before the U.S. courts. *See, e.g., Bandes, supra; Menendez, supra; Tabacalera, supra* (all involving "interventions"). In recent years, numerous cases have been reported involving a foreign state's "taking" of property rights through amendment of its foreign-exchange regulations. *See West* v. *Multibanco Comermex*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987); *Allied Bank Int'l* v. *Banco Credito Agricola*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985); *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica*, 570 F. Supp. 870 (S.D.N.Y. 1983). The contexts in which allegations of foreign takings of property rights can arise are innumerable.

There is another important reason to clarify the situs issue. As Judge Friendly wrote in *Republic of Iraq*, confiscations of property are " 'contrary to our public policy and shocking to our sense of justice,' " and "[f]oreigners entrusting their property to custodians in this country are entitled to expect this historic policy to be followed save when the weightiest reasons call for a departure." 353 F.2d at 51-52 (quoting *Vladikavkazky*, 189 N.E. at 460). If the Seventh Circuit's decision is allowed to stand, however, this interest in protecting foreigners' reasonable expectations that their assets in this country will be protected against foreign seizure will have given way to a virtually irrebuttable presumption that a foreigner's intangible assets are freely subject to foreign seizure. As

noted, the dispositive "fact" in the Seventh Circuit's decision was that petitioner was "an Iranian firm the contemplated and actual operations of which were confined to Iran" (App. 11a). The Seventh Circuit also appeared to consider it important to the analysis that "[w]hat is at issue in this case is not the rights or interests of an American company . . . but the propriety of dealings between the Iranian government and an Iranian corporation." *Id.* The Seventh Circuit's xenophobic approach undermines the purposes of the Act-of-State doctrine's territorial limitation, as expressed by Judge Friendly. No other court has denied to foreigners, purely on the basis of their foreign nationality, the right to assert claims for debts owed to them by firms incorporated in the United States.

But the effects of the Seventh Circuit's rule would in the end be felt not by foreigners, but by American institutions. If the courts in this country hold that debts owed by U.S. citizens to foreign creditors, and foreigners' accounts in American banks, are freely subject to foreign confiscation, foreign investors can be expected henceforth to deposit their money in institutions in countries that protect their property from foreign seizure, and to enter into contracts with businesses from such countries. Intangibles are by definition highly movable assets, and investors base their investment decisions largely on the legal protections afforded these assets, as any Swiss banker can attest.[12] Unless this Court clarifies the circumstances under which such assets are subject to confiscation, foreign investors can be expected to choose to do business with institutions of countries that do clearly protect their intangible assets from foreign seizure.

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[12] It is no accident that the courts in the Second Circuit—the center of international banking and finance in this country—have been the most consistent in reaffirming the expectations that the traditional debt-situs rules were designed to create.

II. A COURT SHOULD NOT DISMISS A LAWSUIT BETWEEN PRIVATE PARTIES BECAUSE OF THE SUIT'S PERCEIVED IMPACT ON FOREIGN RELATIONS UNLESS THE STATE DEPARTMENT ADVISES THE COURT THAT MAINTENANCE OF THE LAWSUIT WOULD ADVERSELY AFFECT THE COUNTRY'S FOREIGN RELATIONS.

In the end, the Seventh Circuit rested its holding on the potential "slap in the face" of Iran that would be delivered if petitioners were permitted to maintain this suit. But Iran has given not the slightest indication that it believes it would be slapped in the face. To the contrary, Iran has shown that it has no interest in the sums claimed by petitioners and would not be offended in the slightest if petitioners were permitted to maintain the lawsuit. At least in cases such as this one, where a foreign state has plainly manifested a lack of interest in the subject of the suit, a court should entertain the action unless the Executive Branch advises the court that maintenance of the lawsuit would adversely affect the nation's foreign relations.

Iran's lack of interest in the subject matter of this case could not be plainer. Iran has had notice of the pendency of this lawsuit since mid-1987, *see supra* note 3. It has never even hinted that it considers itself the true owner of the funds claimed by petitioners or would otherwise be offended if petitioners were permitted to collect them. It has never made an attempt to intervene in this case to raise a claim to these funds. Indeed, Iran was for 4½ years involved in litigation against respondent in the Hague Tribunal relating to the very activities out of which respondent's debt to the Firm arose, and not once did Iran claim that it was the true owner of this debt. *See Harza* v. *Iran*, *supra*. Most important, *Iran itself actually paid over to respondent the very sums that respondent now claims are due to Iran rather than to petitioners.*

There are any number of possible reasons why Iran does not appear to be interested in this fund. Perhaps it recognizes that the debt in question was beyond its territory and thus not reached by its expropriation of the Firm. Perhaps the expropriatory decree under Iranian law did not purport to affect debts owed by foreigners. Perhaps Iran is under the impression that U.S. courts would not be hospitable to a taking of property without compensation. Or perhaps, having litigated against respondent and failed to raise any claim to this money, it now considers itself estopped to claim that the money it paid over to respondent was actually its own. Whatever the reason, the fact remains that Iran has claimed no interest in this fund. It is difficult to believe, therefore, that Iran would somehow be offended, or that the United States' relations with Iran would be even slightly affected, if petitioners were permitted to maintain this lawsuit.

At any rate, the courts are ill-suited to make determinations about a lawsuit's potential impact on U.S. foreign relations, including whether the lawsuit would be taken as a slap in the face of a foreign government (and whether, at this time, that matters). The branch of government to which these issues are entrusted is the Executive, and it should accordingly be the responsibility of that branch to call the court's attention to cases presenting the prospect of adverse foreign relations consequences. If the court perceives the possibility of such consequences and has doubts whether the Executive has been silent because it does not fear such consequences or simply because it has not focused on the lawsuit, the court should seek the Executive's views on the matter. Petitioners asked the court below to do so—twice—but the court did not do so, giving no reasons.

In *Sabbatino*, this Court declined to adopt a rule of the sort we propose here. 376 U.S. at 436-37. *But see id.* at 468-72 (White, J., dissenting) (espousing the rule

proposed herein). The Court then was proceeding on the Executive Branch's representation that it did not favor a procedure that called for it to inform courts of its views in Act-of-State cases. *Id.* at 436. But, in light of two decades of lower-court decisions applying the Act-of-State doctrine as enunciated in *Sabbatino*, the Executive has now modified its views. Concerned by the courts' excessive abdication of their duty to decide cases on the merits, the United States, in its *amicus curiae* brief submitted this term in *W.S. Kirkpatrick* v. *Environmental Tectonics*, No. 87-2066, has taken the following position:

> In general, . . . where application of the [Act-of-State] doctrine may turn on an assessment of the foreign policy interests of the United States, including an assessment of the impact of judicial proceedings in this country on the sensibilities of foreign nations, a court should not undertake to determine those questions for itself. Rather, as the district court did in this case, it should solicit the views of the Executive Branch in these matters, and should give those views the greatest deference in determining whether foreign policy concerns, together with considerations made relevant by other components of the act of state doctrine, require that the court give effect to the act of a foreign state.

Brief of the United States in *W.S. Kirkpatrick* v. *Environmental Tectonics*, No. 87-2066, at 32-33 (filed October 5, 1989). Similarly, the respondents in *Kirkpatrick* have urged the Court to hold that suits should not be dismissed on Act-of-State grounds unless the Department of State recommends that the suit not proceed for foreign policy reasons. Brief for Respondent in *Kirkpatrick*, *supra*, at 46-50 (filed October 5, 1989).[13] The Seventh

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[13] Respondents in *Kirkpatrick* have also urged a broader "reconsideration of—and redefinition of—the [Act-of-State] Doctrine." *Id.* at 46. If the Court in *Kirkpatrick* reconsiders or redefines the doctrine, as urged by respondent, petitioners here respectfully request that the Court summarily vacate the Seventh Circuit's

Circuit chose instead to make its own assessment of the sensibilities of Iran and the lawsuit's potential impact on U.S.-Iranian relations. Petitioners submit that courts have neither the expertise nor the capacity to make such assessments properly.

If this Court in *Kirkpatrick* adopts the rule suggested by the Solicitor General and the respondent in that case, petitioners respectfully request that the Court grant certiorari and summarily remand this case to the Seventh Circuit for reconsideration of the Act-of-State issue after obtaining the views of the Executive Branch. If the Court resolves *Kirkpatrick* without addressing the propriety of dismissing cases on foreign-relations grounds without obtaining the views of the Executive, petitioners request that the Court grant certiorari and consider the issue in this case.

CONCLUSION

The writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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December 1, 1989

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decision in this case and remand the case for reconsideration in light of *Kirkpatrick*.

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-3133

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,
Plaintiffs-Appellants,

v.

HARZA ENGINEERING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 87 C 1599—JAMES B. PARSONS, *Judge*

ARGUED MAY 17, 1989—DECIDED AUGUST 17, 1989

Before WOOD, JR. and POSNER, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* This lawsuit—a bit of fallout from the Iranian Revolution—was filed under the alienage component of the federal diversity jurisdiction. 28 U.S.C. § 1332(a)(2). The plaintiffs are F. & H.R. Farman-Farmaian Consulting Engineers Firm ("Consulting Firm," for short), an Iranian corporation, and Farough

Farman-Farmaian, an Iranian citizen now resident in London. The defendant is Harza Engineering Company, a Delaware corporation whose principal place of business is in Chicago.

Before his ouster by the revolutionary regime, Mr. Farman-Farmaian was the Consulting Firm's managing director and a twenty percent shareholder. He is suing on his own behalf and that of the other owners of the firm—all of whom are members of the Farman-Farmaian family and all of whom gave him a broad power of attorney to prosecute this suit—to collect a debt of some $2 million that Harza allegedly owes the Consulting Firm for work that the firm did for Harza in Iran before the revolution. Harza moved for summary judgment on the ground that the act of state doctrine bars the suit. The district judge agreed; and although the judgment order recites that it is dismissing the complaint, the judge's intent to dismiss the entire suit is plain, which is enough to satisfy the final-decision rule of 28 U.S.C. § 1291. See, e.g., *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 527-28 (7th Cir. 1988). But we repeat our plea that district courts head off spurious issues of appellate jurisdiction by complying with the letter of Rule 58. See, e.g., *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988).

Harza, beginning in the 1960s, had become the prime contractor on a number of major water development projects in Iran, and had engaged the Consulting Firm to perform services for it in connection with these projects. The record does not disclose the nature of the services but all were performed in Iran. The Consulting Firm mailed the invoices for these services to Harza's headquarters in Chicago. Harza had no office in Iran, although the director of its Iranian projects frequently visited Iran for extended periods and while there had the use of an office that the Consulting Firm provided. Harza paid the Consulting Firm's invoices sometimes in dollars but

usually in Iranian currency, and the Consulting Firm deposited all the payments in Iranian banks. Just as Harza had no office in Iran, the Consulting Firm had no office in the United States. The only officer or employee of the firm ever to visit Harza's office was Mr. Farman-Farmaian himself, who had family in Chicago.

In 1979 the revolutionary government seized the Consulting Firm and the next year Harza stopped doing business with Iran because the Iranian government refused to pay Harza's bills. Later the Iranian government decided to dissolve the Consulting Firm—without paying any compensation to its owners—and a board of liquidators was appointed. By this time most of the Farman-Farmaian family wisely had left Iran.

Years later Harza obtained an award from the Iran-United States Claims Tribunal for services rendered to the Iranian government before the Revolution. The plaintiffs claimed that under Harza's contract with the Consulting Firm some $2 million of the Claims Tribunal's award was due to them for services the Consulting Firm had rendered Harza on projects covered by the award. When Harza refused to pay, the plaintiffs filed this suit. Neither the board or liquidators nor any other representative of Iran has filed a claim to the $2 million.

The plaintiffs argued in the district court that the seizure of the Consulting Firm violated Iranian law, but they have abandoned that contention (which the district judge had rejected) on appeal. And they concede that the act of state doctrine generally forbids an American court to question the act of a foreign sovereign that is lawful under that sovereign's laws. To defeat Harza's act-of-state defense they invoke the "extraterritorality" exception. Well discussed in *Tchacosh Co. v. Rockwell International Corp.*, 766 F.2d 1333, 1336-37 (9th Cir. 1985), the exception lifts the bar to suit in cases in which the act of state (1) is confiscatory, and hence contrary to strong American public policy, yet (2) could not be completed within the territory of the foreign sovereign. It

is the second element of the exception that is at issue in this appeal; the first is not contested. See, e.g., *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1965) (Friendly, J.). What the revolutionary government confiscated was the Consulting Firm's claim against Harza for payment for the services the firm had rendered Harza before the firm was seized and its property confiscated. The plaintiffs argue that the revolutionary government could not seize this claim because the debt giving rise to it was "in Chicago" rather than "in Iran."

Before addressing the merits we must determine whether there is federal jurisdiction. The rule of complete diversity—that no plaintiff and no defendant may be a citizen of the same state—applies to alienage cases as well as to ordinary diversity cases. *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2221 (1989). The Consulting Firm is an Iranian corporation and Mr. Farman-Farmaian is also an Iranian citizen, while Harza is for purposes of the diversity jurisdiction a citizen of both Delaware and Illinois. See 28 U.S.C. § 1332(c). So far, so good. The problem is that Mr. Farman-Farmaian is suing not only on his own behalf but also on behalf of the firm's other shareholders, and the pleadings do not indicate their citizenship. Supplemental briefs on jurisdiction filed at our request reveal that one of the shareholders is an Illinois citizen and was at the time the suit was filed. If she is considered a plaintiff, complete diversity is lacking, and with it federal jurisdiction.

Ordinarily the relevant citizenship for diversity purposes is that of the named plaintiff rather than that of the persons on whose behalf he is suing. Obviously this is true of a suit by a corporation—the corporation is the "person" whose citizenship counts, not the shareholders. It was true of suits by trustees and executors, see *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980); *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 186 (1931),

until the enactment last year of 28 U.S.C. § 1332(c)(2). It is true of class actions—only the citizenship of the named plaintiffs matters for diversity purposes. See *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987). And—a close analogy to the present case—it is true of stockholder derivative suits; the citizenship of the named plaintiff is all that counts even though he is suing on behalf of the corporation. See *Doctor v. Harrington*, 196 U.S. 579 (1905); *Venner v. Great Northern Ry.*, 209 U.S. 24 (1908); *Van Gelder v. Taylor*, 621 F. Supp. 613, 621 (N.D. Ill. 1985). On the other hand, the citizenship of a partnership is the citizenship of all the partners, not just of the general partner, despite the close analogy between limited partners and corporate shareholders. So at least we held in *Stockman v. LaCroix*, 790 F.2d 584, 587 (7th Cir. 1986), and *Elston Investment, Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984), although there is a conflict among the circuits on the question which the Supreme Court has granted certiorari to resolve. See *Arkoma Associates v. Carden*, 874 F.2d 226, 228 (5th Cir. 1988), cert. granted, 109 S. Ct. 1106 (1989). In distinguishing the partnership case we pointed out in *Elston* that a partnership has no legal identity separate from that of the partners. See 731 F.2d at 438. This distinction invites the following generalization: in deciding whether the required diversity is present, the court will confine inquiry to the citizenship of the named parties. If there is the required complete diversity of citizenship among them, the question whether the suit can be maintained will depend on whether the named parties are the real parties in interest and whether any indispensable party has been left out. See Fed. R. Civ. P. 17(a), 19(b).

Under this approach, since Mr. Farman-Farmaian is a named plaintiff but the other owners of the Consulting Firm are not, the citizenship of the other owners is ir-

relevant. True, Mr. Farman-Farmaian's representative capacity is *sui generis*. He is not a trustee or guardian of the other shareholders, nor is this a class action or a stockholders' derivative suit. And the plaintiffs sensibly do not argue that the grant of a power of attorney makes the grantee rather than the grantor the party for purposes of determining whether there is diversity—a position that would as a practical matter enable any suit to be maintained as a diversity suit. There is, however, an analogy between this case and the creditor's bill, an old form of class action in which one creditor sued a debtor as representative of all the debtor's creditors and the proceeds of the suit were divided among those creditors who filed an appearance. See *In re American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988). Even if the analogy is rejected, and with it Farman-Farmaian's representative status, all that this would mean is that he might not be able to sue on behalf of the other owners. He could still sue in his own right as a twenty percent shareholder, for no one argues that the other owners are indispensable parties to this suit.

If all this is wrong, still the Supreme Court's recent decision in *Newman-Green* authorizes us to drop a party at the appeal stage in order to preserve diversity jurisdiction. The plaintiffs invite us to drop Mr. Farman-Farmaian, the individual party, if we have any doubts about jurisdiction with him in the case. With him dropped, this would just be a suit between an Illinois corporation and a foreign corporation. As a matter of fact we can think of no reason other than caution why the plaintiffs' counsel thought he needed an additional plaintiff besides the Consulting Firm. The debt is owed by Harza to the firm, not to the firm's owners and not to the firm's managing director and attorney-in-fact (in the power-of-attorney sense), Farough Farman-Farmaian. It is true that the owners have been ousted and have no desire to see the debt paid to the liquidators in Iran, but on

the other hand they cannot succeed in this suit unless they show that the court should disregard the seizure in adjudicating the Consulting Firm's claim against Harza. And if the seizure is disregarded for these purposes, then it is the former owners and not the liquidators who will enjoy the benefit of the judgment, since any money judgment rendered in this suit would be paid to Farman-Farmaian as the managing director of the pre-seizure Consulting Firm.

The principle that underlies (or perhaps merely restates) this conclusion is that corporations expropriated abroad continue to exist with capacity to sue in the United States, provided of course they can show that the court can disregard the expropriation without violating the act of state doctrine. The principle was clearly stated by Chief Judge Cardozo in *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 28, 170 N.E. 479, 481 (1930), and even more clearly in a slightly later decision by the New York Court of Appeals, *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N.Y. 369, 378-79, 189 N.E. 456, 460 (1934). It is implicit in a number of other cases as well—in particular *Baglin v. Cusenier Co.*, 221 U.S. 580, 594-97 (1911); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968); *Compania Ron Bacardi, S.A. v. Bank of Nova Scotia*, 193 F. Supp. 814 (S.D.N.Y. 1961). The principle is obscured because ordinarily, as here, an owner, assignee, or representative is named as a plaintiff in order to obviate disputes over the corporation's capacity arising from the ambiguous status created by the expropriation. See, e.g., *Tchacosh Co. v. Rockwell International Corp.*, *supra*, 766 F.2d at 1335. But the soundness of the principle cannot be doubted after the rejection, in such cases as *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir. 1972), of the proposition that "a foreign sovereign's dissolution of its own corporation is dispositive of the corporation's power to exercise dominion over assets located within the United States simply because the dissolution of

the corporation is an 'act of a foreign state, done within its own territory.'" *Id.* at 1026. The rejection of this proposition *is* the extraterritoriality exception to the act of state doctrine; and unless it is rejected, the plaintiffs could not win this case even if all the owners of the Consulting Firm were named as plaintiffs. (The asset claimed to be "located in the United States" is the debt of Harza to the Consulting Firm.)

So, to conclude on the jurisdictional issue, we do not think the citizenship of the persons represented by Mr. Farman-Farmaian is material, but if this were determined to be wrong we would drop him as a plaintiff to preserve jurisdiction and there would be no effect on the merits. Of course a dismissal of Mr. Farman-Farmaian on jurisdictional ground would, unless denominated with prejudice, leave him free in principle to bring a fresh suit in state court; a dismissal on the merits would not. But as in *Newman-Green* fairness to the other side would dictate dismissal with prejudice; the power to dismiss parties to preserve jurisdiction should not be used to give a dismissed party a second bite at the apple. So the alternative jurisdictional approaches that we have examined really would have the same practical consequences.

We come at last to the merits. The exception to the act of state doctrine on which the plaintiffs rely requires that the act of confiscation not have been complete within the confiscating state. Equivalently, if a foreign state has made a confiscatory "taking," an act offensive to American proprieties, American courts will not lend their assistance to making the confiscation effective. So if the Consulting Firm had assets in Chicago, and the Iranian board of liquidators brought suit here to obtain control of those assets in conformity with the Iranian decree seizing the firm, the suit would fail. See, e.g., *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661, 666-67 (2d Cir. 1988); *United Bank Ltd. v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976). But it is the exception that fails if the confis-

cation was complete within the foreign state in the sense that all of the firm's assets and operations were there, and the victim is trying to get an American court to undo the confiscation. That is this case. The Consulting Firm was an Iranian company all of whose assets and operations were in Iran; the revolutionary regime seized the firm and its assets; one of those assets was the firm's claim against Harza for payment for the services that the firm had rendered Harza in Iran. The *Tchacosh* case, cited earlier, rejected the extraterritoriality exception to the act of state doctrine on facts almost identical to those of the present case. The two Second Circuit decisions that we have cited, *Bandes* and *United Bank*, look the other way, but are distinguishable because in each a shipment of goods to or from the U.S. was contemplated. In this case, all the services under the contract were to be performed in the foreign country.

Granted, to describe the Consulting Firm's claim for payment of Harza's debt to it as an asset located in Iran, as we have done, may be thought to beg the question. A debt (like a word, a number, an idea) has no space-time location; it is not a physical object, and efforts to treat it as such, like efforts in conflicts of law jurisprudence, now largely abandoned, see, e.g., Restatement, Second, Conflict of Laws, § 188 (1971), to find the site of a contract, seem bound to fail. Cf. Leflar, American Conflicts Law § 183 (1977). This acknowledgment does not much help the plaintiffs, though, since they argue that the debt was "in" Chicago—a clearly untenable proposition. Harza's liability was the Consulting Firm's asset, and it is strange to describe the Consulting Firm as having an "American" asset by virtue merely of having a claim against an American company for services performed on that company's behalf in Iran.

The metaphysics and semantics of the issue to one side, the plaintiffs' submission that the debt is located in Chicago would if accepted greatly reduce the accepted scope

of the act of state doctrine—a pertinent although not necessarily a controlling consideration. A dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm. In response to Harza's expression of concern that if it pays the Consulting Firm it may be faced with a claim for the same amount by the Iranian liquidators, the plaintiffs argue that Harza could have interpleaded the Iranian liquidators. Exactly so; and then this court would have been required to determine the legality under Iranian law of the seizure of an Iranian company in and by Iran.

It is just such litigation that the act of state doctrine seeks to keep out of our courts in an effort to minimize interference with the foreign relations of the United States, the conduct of which has been lodged elsewhere in the government. What is at issue in this case is not the rights or interests of an American company (Harza is American, but its only interest is in avoiding double payment, and is protected by applying the act of state doctrine to bar this lawsuit) but the propriety of dealings between the Iranian government and an Iranian corporation. With the American interest so attenuated, considerations of comity—that is, of sensitivity to the potential frictions between proud sovereigns—come to the fore; and it is those considerations, and the resulting concern with the judiciary's stepping on the State Department's toes, that inform the modern understanding of the act of state doctrine. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-33 (1964); Restatement of the Foreign Relations Law of the United States, § 443, comment a (1987). For an American court to say to Iran, "We won't pay any attention to your seizure of the Consulting Firm without compensation to the owners, because it's the sort of act that is abhorrent to Americans," would be a slap in the face of the Iranian regime. Such slaps would be frequent if the happenstance of being owed money by an

American was enough to waive the act of state doctrine. It is true that the government of Iran is not a party to this suit, but we said slap in the face, not slap in the pocketbook—and there could be that too, because the liquidators appointed by the government have a potential claim against Harza as the successors to the owners of the Consulting Firm, although it seems unlikely that the claim will ever be pressed.

Granted, the slap would sting no less sharply if the Consulting Firm had had assets in the United States or of its contract with Haza had contemplated transactions between the U.S. and Iran rather than wholly within Iran; and considerations of territoriality may seem as anachronistic as they are elusive as a guide to the boundaries of the act of state doctrine. But the United States has an independent concern with protecting property and transactions (perhaps even contemplated transactions, as in the two Second Circuit cases) within its borders; that is the interest which underlies the extraterritorial exception to the act of state doctrine. That interest is not present here. Despite the possibility (no more than that, for Harza does not concede its indebtedness, and the liquidators may still make a claim against it) of a windfall for Harza, we do not believe ourselves to be authorized to disregard an act of the Iranian state against an Iranian firm the contemplated and actual operations of which were confined to Iran, which had no assets outside of Iran, and which was seized in Iran pursuant to locally valid Iranian law.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
August 17, 1989

Before
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JESSE E. ESCHBACH, Sr. Circuit Judge

No. 88-3133

F & H.R. FARMAN-FARAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,
Plaintiffs-Appellants,

vs.

HARZA ENGINEERING COMPANY,
Defendant-Appellee.

Appeal from the No. Dist of IL., East. Div.
87-C 1599—James B. Parsons, Judge

JUDGMENT—ORAL ARGUMENT

This case was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED and ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 20, 1989

Before
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

No. 88-3133

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,
Plaintiffs-Appellants,

v.

HARZA ENGINEERING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 87 C 1599—James B. Parsons, *Judge*

ORDER

On August 30, 1989, plaintiffs-appellants filed a petition for rehearing. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number 87 C 1599
(Judge Parsons)

F. & H. R. FARMAN-FARMAIAN CONSULTING, *et al.*

v.

HARZA ENGINEERING CO.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss the complaint is granted.

Date Sept. 30, 1988

H. STUART CUNNINGHAM
Clerk

/s/ R. M. McGhee
R. M. MCGHEE
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 1599

F. & H. R. FARMAN-FARMAIAN CONSULTING, *et al.*,
Plaintiffs,

vs.

HARZA ENGINEERING COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiffs' complaint causes this court to revisit the time in 1979 of a dramatic upheaval in Iran—the Iranian revolution against the Imperial Government of the Shah of Iran. Vestiges of that revolution remaining today, nine years later, are apparent in uncertain diplomatic relations between the United States and the Islamic Republic of Iran. Similarly, financial interest of United States citizens and Iranian citizens doing business in Iran at the time of the revolution have not survived unscathed. It is from these changes in business relations between the citizens of the two countries that this dispute arose.

Plaintiffs are Iranian citizens who left Iran following the revolution. They are the former stockholders of F. & H.R. Farman-Farmaian Consulting Engineering Firm (the F-F firm), an Iranian corporation. The F-F firm was engaged by the defendant, a United States engineering corporation with its principal offices here in Chicago, as a subcontractor on the engineering and construction of projects to be erected in Iran.

Plaintiffs came to Chicago to file this complaint against the defendant alleging a breach of contract and unjust

enrichment with regard to work which the F-F firm performed, but for which it was never compensated, under an agreement it had with the defendant. The defendant has moved to dismiss the complaint, or in the alternative for summary judgment, on the basis that Mr. Farough Farman-Farmaian, the managing director of the F-F firm who also brings this suit on behalf of the former stockholders of the F-F firm, lacks capacity to sue in the name of the F-F firm. Because the parties have tendered affidavits and other evidence, I must treat this as a motion for summary judgment. Fed. R. Civ. Pro. 12(b). Accordingly, having reviewed all materials submitted, I find that no genuine issue of a material fact exists precluding my entry of a summary judgment.

FACTS

In the 1960's Harza Engineering Company (Harza) contracted with the government of Iran to provide engineering services for major water and power projects on the Marun and Karun Rivers of Iran. Harza was the prime contractor on these projects, but pursuant to the contract with the Iranian government Harza was required to associate with an Iranian firm. Harza selected the F-F firm as its engineering associate.

Farough Farman-Farmaian (Farough) and Haroon Rashid Farman-Farmaian (Rashid), Iranian citizens and brothers, served as Managing Director and Chairman of the Board, respectively, and along with their families they held all of the stock in the F-F firm. The services the F-F firm was to provide under its Collaboration Agreement with Harza included representing Harza in negotiations with the Iranian government, providing local staff and facilities based at regional offices, and performing emergency services in the Teheran offices. All of the work for which Harza engaged the F-F firm was to be performed in Iran; however, Farough did on occasion visit Harza's offices in Chicago to discuss the progress on the projects or financial matters related thereto.

Work on these various projects continued throughout the 1970's. In 1978, Farough left Iran just prior to the revolution and because of the politics of the revolutionary government he has never returned. Rashid remained in Iran during the revolution and continued operating the F-F firm during the revolution and continued operating the F-F firm [sic] until he was arrested and imprisoned by the new government in 1979.

In 1979 the revolutionary government enacted the Temporary Director Act providing that the former directors of a company cease to have power to manage the company upon the appointment of a temporary director. The act applied to consulting engineering companies, among others, whose directors had either abandoned the company or whose directors could not be reached or those companies where work had been suspended. Pursuant to this act, the government, beginning on August 6, 1979, appointed a series of temporary directors for the F-F firm. These directors were vested with the full and exclusive authority to manage the affairs of the F-F firm.

Subsequently, in 1980, the government enacted an "Act Concerning the Management and Ownership of Shares of Contracting and Consulting Firms" (the 1980 Act), which authorized a cabinet-level commission to determine which consulting companies served continued purposes and which companies should be dissolved. This commission decided the F-F firm was among those companies which should be dissolved and therefore appointed a Board of Liquidators for that purpose in January 1982. Under Iranian law, during the period that the F-F firm is in liquidation proceedings, the Board of Liquidators has full and exclusive authority over the F-F firm, including all rights to bring lawsuits on its behalf. Neither the equity owners of the company nor the former directors have any authority to act on the company's behalf.

After Rashid was released from jail in 1983, he continued to reside in Iran until his departure in 1987.

Prior to his departure, however, Rashid inquired of the government as to the ownership and status of the F-F firm. In 1986, the Iranian Ministry of Justice informed Rashid that the F-F firm had been legally dissolved and a Board of Liquidators had been appointed.

Harza had ceased its operations in Iran in 1980 because the Iranian government failed to pay Harza for services rendered on the engineering projects. In 1986, Harza received an award from the Iran-United States Claims Tribunal for certain services rendered, which included, in part, payment for the services the F-F firm had rendered on Harza's behalf on these projects. Farough instituted this suit in this court against Harza on behalf of the F-F firm and all former shareholders seeking that portion of the sum which Harza had received from the tribunal that represented payment for the F-F firm's services, as well as other additional sums allegedly due the F-F firm.

DISCUSSION

The parties do not dispute this sequence of events and the actions which the revolutionary government took against the F-F firm. The only question is whether these actions divested Farough of his capacity to sue on behalf of the F-F firm. On this issue the parties have submitted affidavits from experts in Iranian law and not surprisingly these experts differ in their interpretation of the laws promulgated by the revolutionary government. These differences in the interpretation of Iranian law do not, however, present any issue of fact precluding summary judgment since questions of foreign law are to be determined by this court as a matter of law after it has had an opportunity to review the relevant foreign law along with any other material that could be submitted by the parties. Fed. R. Civ. Pro. 44.1.

Farough's expert provides an interpretation of the relevant Iranian law that would permit Farough to bring this action as a party authorized to act on behalf of the

F-F firm. This interpretation is based on two contentions. Farough's expert first contends that the 1979 Temporary Director's Act and the 1980 Act permitting the Commission to dissolve the F-F firm and to appoint a board of liquidators did not divest Farough of his authority to act for the F-F firm. Second, these laws were in contravention of the Iranian Constitution and the Iranian government subsequently in 1984 and in 1987 nullified these laws and any actions taken by the government pursuant to them. My reading of these laws does not comport with this interpretation.

The language of the temporary Director's Act and the 1980 Act makes clear that the former directors are disqualified from managing the companies' affairs, and the acts vest *all* authority and managerial powers in the Temporary Director or Board of Liquidators, subject only to governmental approval on some matters.[1] See "Act Concerning the Appointment of a Temporary Director or Directors for the Supervision of Production, Industrial, Commercial, Agricultural and Service Units whether in the Public or Private Sectors," Articles 2, 3; Commercial Code of Iran, Articles 208, 211, 212; *See also Tchacoch* [sic] *Company Ltd. v. Rockwell International Corp.*, 766 F.2d 1333, 1335 (9th Cir. 1985). Pursuant to these laws Farough is divested of all managerial authority and lacks capacity to bring this suit on behalf of the F-F firm.

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[1] Article 2 of the Temporary Directors Act provides in part:

> Upon issuance of the said order [of appointment of a temporary director] . . . the former director or persons in charge shall be disqualified from managing the affairs of the unit.

Similarly, Article 3 states that the temporary directors "[a]re in every respect, but without the right of delegation, the legal successors of the original directors of the units, companies, and organization described in Article 1, and hold all the necessary authority for the administration thereof in the ordinary course of business.

Farough notes, however, that these laws should not have applied to the F-F firm since the conditions precedent which would have triggered their application to the F-F firm, e.g., insolvency and abandonment by the directors, were not satisfied under the facts. But that matter is not an issue properly to be disposed of by this court. If Farough disputes the legitimacy of the government's actions with respect to the F-F firm, mechanisms exist by which he may challenge the propriety of those actions in Iran. Significantly, Farough does not dispute that the government has in fact appointed temporary directors and a board of liquidators. In any event, the legal import of that action is the only issue for determination and I conclude that Farough was divested of his authority as a result of these actions.

The second challenge presented by Farough's expert is a frontal attack on the validity of these laws which the revolutionary government enacted and on the legality of the actions taken pursuant to these laws. Prior to the revolution, Iran's constitution, enacted in 1906 and supplemented in 1907, provided that Iranian citizens are entitled to be free from interference from the government in their lives and in their possession of property. The Iranian constitution enacted after the revolution preserved this right in their citizens subject to when "the law provides otherwise." Article 4 of this 1979 Constitution describes broadly those instances in which the government may confiscate property.[2] A difference of interpre-

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[2] Article 49 of the 1979 Constitution provides in relevant part:

"The government shall seize wealth derived from usury, usurpation, bribery, embezzlement, theft, gambling, misappropriation of endowments, misuse of government contracting and transactions, sale of wastelands and unowned properties, operation of centers of corruption, and other illegitimate [non-Islamic] cases and shall return such wealth to its proper owner. In cases where the proper owner is unknown, the Government shall submit the wealth to the treasury. The present command shall be carried out by the govern-

tation between the parties exist over whether Article 49 of the constitution was self-executing thereby permitting the government to confiscate or expropriate property, or whether some legislative directive was first required before the government could act as it did in 1979.

Farough's expert contends that any expropriation pursuant to Article 49 required separate legislative approval and that this was not sought for those actions in 1979 which deprived Farough and his family of their interest in the F-F firm. Farough buttresses this argument by reference to a 1984 legislative enactment entitled "An Act Concerning the Implementation of Principle 49 of the Constitution of the Islamic Republic of Iran" wherein the act specifies the procedures by which the government through the state's prosecution in the courts may confiscate property for the public benefit. This act also states how parties whose property has been confiscated may lodge complaints and seek the return of their property. Farough reasons that since the actions in 1979 were not done pursuant to this later legislation they were invalid. Only the Act of 1984 provided the government with a legal basis on which to confiscate or expropriate property.

This reasoning, however, ignores the actions of the revolutionary courts of Iran between the years 1979 and 1984. Throughout those years the Council of the Revolution expressly recognized and confirmed the actions taken by the Revolutionary Courts in confiscating properties such as the F-F firm. The 1984 Act was merely another in a series of legislative enactments that recognized the authority of the Revolutionary Courts to expropriate private property. The 1984 Act did not invalidate any of the expropriations that had been decreed by the Revolutionary Courts prior to it. The only substantive addition to the existing laws resulting from the adoption of the 1984 Act has been a process by which persons who believe that

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ment upon proper investigation, verification and proof according to divine [Islamic] law."

their property was improperly expropriated may petition to have their property restored to them. However, providing for such a petition process did not itself invalidate any of the expropriations that had previously occurred. Those expropriations remain valid until they are set aside by some new court decree as a result of some new judicial proceeding. It is not disputed that since the adoption of the 1984 Act plaintiffs have not sought any order through the Iranian courts to have the expropriation decree declared invalid.

I find that the adoption of the 1984 Act was consistent with the actions that had been taken by the Revolutionary Courts, and I can find no reasonable basis for belief that the 1984 Act was ever intended to invalidate all prior expropriations. This interpretation of the 1984 Act is consonant with subsequent actions taken by the Iranian government. In June of 1985, a new liquidator for the F-F firm was formally appointed by the government to complete the liquidation of the F-F firm. And, in September of 1986, in reponse to the inquiry from Rashid the government certified that the F-F firm had been dissolved and its liquidators appointed. This position was reaffirmed as recently as June of 1988 when the Iranian government again certified that the F-F firm was in liquidation. This pattern of consistent affirmation that the F-F firm was dissolved and is in the process of liquidation refutes any suggestion that the government now considers invalid any expropriation by the Revolutionary Courts that had occurred before the enactment of the 1984 Act.

Similarly, I also find the claim that recent events in Iran alter the status the plaintiffs' rights relative to the F-F firm to be without merit. Farough's expert contends that directives issued in 1987 by the President of Iran and his cabinet regarding the rights of individuals in expropriated property evidence the government's concern and fundamental respect for private property and there-

fore actions taken by the Revolutionary Courts are invalid. The directives to which plaintiffs' expert refers, however, do not apply to the law under which the F-F firm was expropriated. The F-F firm was placed in liquidation under the Act concerning the Management and Ownership of the Share of Contracting and Consulting Companies. The opinions and directives plaintiffs rely upon do not refer to expropriation made under this act but refer instead to expropriations made under other laws. Consequently, the contention that the government has retreated from the expropriation of the F-F firm and similar action under law is plainly unsupported by the record. The laws the Iranian government promulgated after the revolution provide a comprehensive framework by which the government could seize and manage business such as the F-F firm. I find no internal conflict between these laws, and there is nothing in their provisions to suggest that the expropriation of the F-F firm was done without authority or in violation of the Iranian Constitution. Accordingly, under the present laws in Iran, I must find that Farough and the former officers of the F-F firm have been divested of their authority to bring suit on behalf of the firm, and that they lack standing to maintain this action.

Even if the expropriation decree failed to comply with the formal requisites of Iranian law, this court nonetheless must recognize the sovereign power of Iran and accord its actions deference. The Act of State doctrine which received its classic expression in *Underhill v. Hernandez*, 168 U.S. 250 (1897), requires this.

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open

> to be availed of by sovereign powers as between themselves.

Id. at 252.

The Act of State doctrine operates as an issue preclusion device foreclosing a court's inquiry into the validity of propriety of a foreign government's acts. *See Arango v. Guzman Travel Advisors Corporation*, 621 F.2d 1371, 1380 (5th Cir. 1980). Farough, however, urges this court to refuse to give effect to the Iranian decree because it is in conflict with this nation's public policy against confiscations of private property without compensation.

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), our Supreme Court crafted a corollary to the Act of State doctrine, a principle which directs that courts of the United States need not give extraterritorial effect to a confiscatory decree of a foreign state, even against its own nationals, where the situs of the affected property is the United States. The Court limited the Act of State doctrine to takings of property "within its own territory by a foreign sovereign government," *id.*, and if the property is located in United States territory at the time of confiscation, our courts will given effect only if the act of confiscation is consistent with the policy and law of the United States. *See Callejo v. Bancomer S.A.*, 764 F.2d 1101, 1121 (5th Cir. 1985); *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965) *cert. denied*, 382 U.S. 1027 (1966). Because taking of property without just compensation is "shocking to our [this nation's] sense of justice," *see Republic of Iraq*, 353 F.2d at 51, and denies a person the full measure of due process that we so richly prize in this country, Farough argues that this court should refuse to give effect to the Iranian decree divesting him of control over the F-F firm.

This argument was expressly rejected under similar circumstances in *Tchacosh Company Ltd. v. Rockwell In-*

ternational Corporation, 766 F.2d 1333 (9th Cir. 1985), where Tchacosh, an Iranian corporation which had been expropriated by the government, sought to recover from Rockwell on a contract claim for services rendered on a subcontract performed in Iran. After first finding that the plaintiff lacked authority under Iranian law to bring the suit, the court of appeals considered whether the Iranian decree should be given extraterritorial effect in this country. Tchacosh argued that the situs of the contract claim was the United States and therefore the Iranian decree expropriating the firm need not be given effect in this country. The court of appeals rejected this approach because it found that at the time of the expropriation Rockwell held no assets or property of Tchacosh's in the United States and it could not be said that the United States was the situs of the property expropriated. The only connection that the relationship between the parties had to the United States was that the defendant was located here. *Id.* at 1338-39.

I find the facts in the present case are not so different that they mandate a different conclusion here. The subcontract between Harza and the F-F firm contemplated that all services would be performed in Iran, all invoices from the F-F firm would be sent to Harza's office in Teheran with copies to the Chicago office, and all payments to the F-F firm would be in rials and made through Iranian banks. During the course of the relationship only minor modifications of these arrangements occurred. Farough pressed to have a small portion of the payments made in dollars and attributed this to "work outside Iran" presumably so he could avoid Iranian tax on the payments. Farough also made infrequent trips to Harza's offices in Chicago for brief discussions on the progress being made on the various projects. These appearances at Harza's Chicago office were not at Harza's request. Apparently they were timed to allow at the same time visits by Farough with his children who were residing here in the United States. But all financial records relat-

ing to payments in rials to the F-F firm were maintained in Harza's office in Iran. The largest proportion of compensation paid to the F-F firm was in rials and the payments were made to him through the Iranian banks in which Harza maintained banking accounts.

While the relationship between the parties necessarily has some contacts with the United States since Harza itself is based here in Chicago, all of the functional elements of the relationship were centered in Iran. As in *Tchacosh*, Iran was in a position to "perform a fait accompli" over the payment or receipt of any money owed the F-F firm by Harza. *Tchacosh*, 766 F.2d at 1338 (citing *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Company*, 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

Farough cites to us a number of cases in which United States courts have refused to give effect to confiscatory decrees issued by foreign sovereigns, but these cases discuss claims and expropriated property under facts that are quite dissimilar to the facts here. *See, e.g., United Bank Ltd. v. Cosmoc* [sic] *International, Inc.*, 542 F.2d 868 (2d Cir. 1976) (goods sold by a foreign firm and delivered in the United States before the foreign firm was expropriated); *Republic of Iraq, supra*, (bank account and custodial securities account established in a United States bank before expropriation decree issued); *Zwack v. Kraus Brothers and Company*, 237 F.2d 255 (2d Cir. 1956) (United States trademark rights acquired by a foreign firm prior to its expropriation). In all of such cases, the underlying transaction that gave rise to the debt occurred in the United States. Even a most recent decision of the Second Circuit Court of Appeals in *Bandes v. Harlow and Jones*, 1988 WL 77056 WESTLAW (2d Cir. 1988), a case which Farough argues should be given considerable attention by this court, involved a fund that existed in the United States prior to the issuance of the expropriation decree.

None of the cases on which Farough relies involves a contract claim for services rendered by a foreign corporation in a foreign country, which claim accrued *after* the issuance of the expropriation decree. As Harza notes, under the agreement, the F-F firm was not entitled to receive payment for its services until Harza first received payment from the Iranian government. At the time of the expropriation decree Harza had not been paid and did not receive payment until 1986. Thus at the time of the expropriation the F-F firm's entitlement to compensation for its services did not mature until *after* the expropriation and *after* the F-F firm was controlled by the government. I find little difference between this and those cases wherein the claim for which payment is sought was created by the shipment of goods *after* the expropriation occurred. In those cases, the claim is deemed to belong to the expropriated company that shipped the goods. *See Sabbatino, supra; F. Palicio v. Compania, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd. mem.* 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967)

The principles underlying the Act of State doctrine require that it be invoked under the circumstances of this case. The United States has no connection to the relationship between the parties except that Harza has an office here. The contract claim on which Farough sues matured entirely in Iran after the expropriation of the F-F firm. In Iran there presently exist means by which this dispute may more appropriately be resolved. "When a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the res before it and acts in such a manner as to change the relationship between the parties touching the res, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity." *Tabacalera*, 392 F.2d at 715. Under the circumstances, I am compelled to find the Iranian decree expropriating the F-F firm must be accorded deference.

I conclude therefore that, since at the time of the Iranian decree, Harza had no property or assets of the F-F firm within the United States, and since under it the government of Iran acquired all rights to claim or sue for property or assets owed by Harza to the F-F firm arising from the subcontract for services in Iran, in accordance with the Act of State doctrine, the Iranian decree divesting Farough and all the F-F firm's former stockholders of authority to bring this suit on behalf of the F-F firm, will have to be given effect. Defendant's motion to dismiss the complaint will have to be allowed. And it is so ordered.

ENTER:

/s/ James B. Parsons
JAMES B. PARSONS
United States District Court Judge

Dated: September 30, 1988

No. 89-867

Supreme Court, U.S.
FILED
JAN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,

Petitioners,

v.

HARZA ENGINEERING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that the Act-of-State Doctrine precluded them from entertaining a suit brought by the former owners of an Iranian engineering firm to recover a debt allegedly owed to that firm for engineering services rendered in Iran, because the Government of Iran, acting validly pursuant to its laws, has expropriated the plaintiffs' interest in the Iranian firm?

2. Whether the courts below acted properly in deciding the above question without first seeking the views of the Executive Branch, when: (a) petitioners made no timely request to either court to obtain the views of the Executive Branch; (b) the Executive Branch, although made aware of this case by petitioners, expressed no desire to participate in it; and (c) the law recognizing such expropriations is well-established?

Rule 29.1 List

For Respondent Harza Engineering Company:

Parent: None.

Subsidiaries (other than wholly owned subsidiaries):

None.

Affiliates:

Harza Engineering Company International L.P., a Delaware Limited Partnership.

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STATUTES AND REGULATIONS:

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In The

Supreme Court of the United States

October Term, 1989

No. 89-867

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,

Petitioners,

v.

HARZA ENGINEERING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.[1]

[1] There is no valid reason for the Court to hold this petition until the Court rules in *W.S. Kirkpatrick v. Environmental Tectonics*, No. 87-2066. *Kirkpatrick* involves entirely different issues and facts. The need for solicitation of an expression of the Executive Branch's views before deciding Act-of-State

(Continued on following page)

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" distorts the record. The undisputed facts, as found by the District Court and reaffirmed by the Court of Appeals, may be summarized as follows:

This action was brought by Farough Farman-Farmaian ("Farough"), a citizen of Iran and a former owner and managing director of an Iranian firm known as F. & H.R. Farman-Farmaian Consulting Engineers Firm ("Firm"). The Firm is an entity equivalent to a corporation; it was created under Iranian law and has its principal place of business in Iran. (Petitioners' Complaint (R.1), p.1, ¶1). In 1964, the Firm and Respondent, Harza Engineering Company ("Harza"), entered into an agreement entitled "COLLABORATION AGREEMENT FOR REPRESENTATION AND CONSULTING ENGINEERING SERVICES IN IRAN" (The "Collaboration Agreement")[2]. Farough brought this action, purportedly on behalf of the Firm and its various owners, to recover fees he claims are owed to the Firm by Harza under the Collaboration Agreement.

(Continued from previous page)

cases, the issue supposedly involved here, is not involved in *Kirkpatrick*, because the views of the Executive Branch were expressed in *Kirkpatrick*.

[2] Petitioners refer to this agreement only as the " 'Collaboration Agreement' " and omit the fact that the very title of the agreement specifies that the services to be rendered by the Firm were to be "in Iran."

The Relationship Between the Firm and Harza.

Shortly after entering into the Collaboration Agreement, Harza entered into a primary agreement with the Iranian Ministry of Power and Water (the "Ministry") to render engineering services to the Ministry on certain large dams and hydroelectric projects located in Iran. (Petitioners' Appendix ("Pet. App.") 16a). The primary agreement with the Ministry required that Harza associate with a local Iranian firm, which Harza did through the Collaboration Agreement.

The Collaboration Agreement between Harza and the Firm provided that they would "collaborate on the engineering and execution of Consulting Engineering Services *in Iran*. . . ."[3] (emphasis added). (R.1, Ex.A.1, p.1). Payments by Harza under the Collaboration Agreement were to be made to the Firm in Iran after payment was received by Harza on its contract with the Ministry. (R.1, Ex.A.1, p.3). Harza had a bank account in Iran through which it received payment from the Ministry and, in turn, paid the Firm. Harza also had an Iranian accountant in Teheran to handle its financial affairs.

The District Court correctly found that "the United States has no connection to the relationship [between the

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[3] The "consulting engineering services" which Petitioners claim the Firm performed "in Chicago" consisted of infrequent visits by Farough to Chicago which coincided with visits to his children who lived in the United States (R.1, p.6, ¶16; Pet. App. 3a, 25a-26a). Farough was the only principal or employee of the Firm (out of 60 professionals and 100 employees) to come to the U.S., allegedly on Firm business (R.1, p.6, ¶16).

Firm and Harza] except that [Harza] has an office here." (Pet. App. 27a). The Seventh Circuit affirmed, noting that the Firm's "contemplated and actual operations . . . were confined to Iran" and that the Firm had no assets outside Iran.[4] (Pet. App. 11).

The District court described the relationship between Harza and the Firm as follows:

> "The sub-contract between Harza and the F-F firm contemplated that all services would be performed in Iran, all invoices from the F-F firm would be sent to Harza's office in Teheran with copies to the Chicago office, and all payments to

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[4] Petitioners refer to "funds . . . deposited in a specific account in a Chicago bank," "a specific *per diem* for services performed outside Iran by the Firm's principals," "[s]ome payments [being] made in dollars, others in Iranian rials," "billing, accounting and other financial records [being] maintained by Harza in Chicago," and the Firm's sending invoices to Chicago (Petition 2-3). These claims are distortions of the record and are irrelevant as was recognized by the courts below. The funds deposited in Chicago (for tax reasons) were *de minimis*, and in any event are not the funds that Petitioners are claiming. (Pet. App. 25a). The *per diem* was for services performed outside Teheran, not outside Iran. (R.1, Ex.A.1, p.5, ¶3). By far the largest payments were to be made in Iranian rials, not dollars, including the payments at issue here (Pet. App. 25a-26a). The Firm's invoices were sent to Iran as well as Chicago and the invoices were paid in Iran, not Chicago (Pet. App. 25a). Petitioners' references to engineering, accounting and other work done by Harza in Chicago is just one aspect of Petitioners' persistent (but so far unsuccessful) attempt to confuse two different things: the work done by Harza under its contracts with the Ministry, which is not the subject of the Petitioners' claim, and the work done by the Firm under its subcontract with Harza, the Collaboration Agreement, which is the subject of Petitioners' claim. This work was done exclusively in Iran.

> the F-F firm would be in rials and made through Iranian banks. During the course of the relationship only minor modifications of these arrangements occurred. Farough pressed to have a small portion of the payments made in dollars and attributed this to 'work outside Iran' presumably so he could avoid Iranian tax on the payments. Farough also made infrequent trips to Harza's offices in Chicago for brief discussion on the progress being made on the various projects. These appearances at Harza's Chicago office were not at Harza's request. Apparently they were timed to allow at the same time visits by Farough with his children who were residing here in the United States. But all financial records relating to payments in rials to the F-F firm were maintained in Harza's office in Iran. The largest proportion of compensation paid to the F-F firm was in rials and the payments were made to him through the Iranian banks in which Harza maintained banking accounts.
>
> While the relationship between the parties necessarily has some contacts with the United States since Harza itself is based here in Chicago, all of the functional elements of the relationship were centered in Iran. As in *Tchacosh [Co. v. Rockwell International Corp.*, 766 F.2d 1333 (9th Cir. 1985)], Iran was in a position to 'perform a *fait accompli*' over the payment or receipt of any money owed the F-F firm by Harza."

(Pet. App. 25a-26a).

As the Seventh Circuit put it, "[w]hat is at issue in this case is not the rights or interests of an American company . . . but the propriety of dealings between the Iranian government and an Iranian corporation" (Pet. App. 10a).

Expropriation of the Firm.

In 1979, the former managers of the Firm, including Farough, were divested of management of the Firm and replaced by officials appointed by Iran under the "Temporary Director Act." (R.20, ¶¶17,18; Petitioners' Appellate Brief 5-6; Pet. App. 17a-18a). In 1980, the stock in the Firm was expropriated by the state of Iran under the Iranian "Management and Acquisition Act." (See Affidavit of Iranian law expert, Mahmoud Katirai, (R.20), ¶26; Pet. App. 17a-18a). At pages 12 and 13 of their Petition, the Petitioners state that "[P]etitioners do not challenge the validity of the taking under Iranian law, but only its reach outside Iran." (Petition 12-13).[5]

Nature of Petitioners' Claim

At the time of the Iranian Revolution, Harza was owed substantial fees for services rendered to the Iranian Government. Pursuant to the Algerian Accords (regarding the freeing of American hostages) and the Claims Settlement Agreement between the United States and Iran, Harza brought a claim against Iran before the Iran-U.S. Claims Tribunal at The Hague. After extensive litigation, Harza received some, but not all, of the amount

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[5] The principal thrust of Petitioners' argument in the District Court was to contest the validity and effectiveness of Iran's actions *under Iranian law* (Pet. App. 3a). Despite having filed affidavits of a purported expert in Iranian law to the opposite effect (Pet. App. 18a-19a), Petitioners later conceded that these expropriations (or "confiscations" as Petitioners call them) were legal and effective under Iranian law. (Pet. App. 3a; Petitioners' Appellate Brief 5-6).

claimed.[6] Farough then demanded payment from Harza, claiming that part of Harza's recovery was for services rendered by the Firm. Farough purported to be acting on behalf of the Firm; however, at that time, Farough was not an owner, manager or representative of the Firm and Harza declined to pay him. Farough then filed this suit.[7]

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[6] Harza's receipt of this award can hardly be considered a "windfall," as Petitioners imply. Harza received only a partial recovery, which was further reduced by the portion of Harza's claim attributable to non-U.S. shareholders. (R.1, Ex.D.1, ¶¶25-32). To obtain the award, Harza had to incur substantial fees, travel and other expenses, and disruption to its business. Harza was also forced to defend against an enormous counterclaim in the Tribunal which would have bankrupted Harza had the counterclaim been successful. (R.1, Ex.D.1, pp.47-85). Further, Harza paid a "skim-tax" levied by the U.S. government on all Tribunal awards, which amounted to $168,256.45. *See, United States v. Sperry Corporation*, ___ U.S. ___, 110 S.Ct. 307, 50 U.S.L.W. 4018 (1989) (skim-tax held constitutional). Moreover, as the Court of Appeals noted, whatever "windfall" Harza might temporarily enjoy would be nullified if other claimants, perhaps the Iranian liquidators, insisted Harza pay them. (Pet. App. 11a).

[7] Initially, Farough filed this suit on behalf of both the Firm and the shareholders. One of the other shareholders is now a U.S. citizen residing in the Northern District of Illinois (Pet. App. 4a). Her U.S. citizenship, which would have destroyed complete diversity, was not disclosed until oral argument before the Court of Appeals. After disclosure of this fact, Farough retreated from his claim that he was filing suit on behalf of the other shareholders, leading the Court of Appeals to conclude that there was federal jurisdiction under the diversity statute. (Pet. App. 4a-8a).

Petitioners' Failure to Timely Request Solicitation of the Views of the Executive Branch.

Although Farough filed four briefs in the District Court resisting defendant's motion for summary judgment, and also was granted oral argument on the motion, at no time did he request that the District Court solicit the views of the Executive Branch. Since this issue was not raised by Petitioners, it was not passed on by the District Court.

It was not until after briefing had been completed in the Court of Appeals that Petitioners suggested for the first time that the court solicit the views of the Executive Branch on the Act-of-State issue. This suggestion took the form of a letter from counsel for Petitioners, which is reprinted in the Appendix to this brief (Res. App. 1a). The letter purported to be filed under Federal Rule of Appellate Procedure 28(j) and Seventh Circuit Rule 28(i), but it did not conform to those rules in either form or substance.[8] Because counsel's letter did not conform to the rules, Respondent did not respond to it. The Court of Appeals did not act on it.

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[8] Both F.R.A.P. 28(j) and Seventh Circuit Rule 28(i) forbid argument. Circuit Rule 28(i) states that:

> "The letter shall state in a single brief sentence the proposition the authorities support but shall contain no other argument or explanation."

Further, F.R.A.P. 28(j) is not designed to accommodate afterthoughts. It is confined to the situation where

(Continued on following page)

The issue was not mentioned again until the PETITION FOR REHEARING filed by Petitioners in the Court of Appeals on August 30, 1989, which was later denied.[9]

Thus, Question 2 of Petitioners' "QUESTIONS PRESENTED" (the purported need for an expression of the Executive Branch's views) was neither timely nor properly raised by Petitioners before either the District Court or the Court of Appeals.

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> "pertinent and significant authorities come to the attention of a party after the party's brief has been filed. . . ."

However, the cases cited by Petitioners in their letter were decided before the filing of their brief. Obviously, Petitioners were aware of these cases before they filed their briefs in the Court of Appeals since these cases are cited in those briefs. (Petitioners' Appellate Brief, 20, 37; Petitioners' Appellate Reply Brief, 4, 5).

[9] Significantly, the letter of Petitioners' counsel to the Court of Appeals indicates that Petitioners had "provided a copy of the [District Court decision in this case] to the Department of State, and [Petitioners] have now also provided to the Department [of State] copies of the briefs filed in [the Court of Appeals]." The PETITION FOR REHEARING states that Petitioners also provided a copy of the opinion of the Court of Appeals to the Department of State sometime before August 30, 1989. Despite being informed of the District Court's decision, and later that of the Court of Appeals, the Executive Branch expressed no view and gave no indication of any desire to do so. Nor has the Executive Branch filed an amicus brief in this case suggesting that this Court grant the petition for a writ of certiorari, as it did in *Kirkpatrick*.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Seventh Circuit's decision in this case does not conflict with the decision of any other circuit. To the contrary, the Seventh Circuit's decision followed an indistinguishable and unanimous decision of the Ninth Circuit Court of Appeals affirming the U.S. District Court for the Central District of California in a virtually identical case. (Pet. App. 9a, citing *Tchacosh Co. v. Rockwell International, Corp.*, 766 F.2d 1333 (9th Cir. 1985)).[10] No circuit court to Respondent's knowledge, and no case cited by Petitioners, has expressed the view that there is a conflict of circuits. To the contrary, the Seventh Circuit in this case and the Ninth Circuit in *Tchacosh* easily reconciled the cases on which Petitioners rely. See Pet. App. 8a-9a; *Tchacosh*, at 1338.

Petitioners attempt to create the appearance of a conflict with other circuits by distorting the holdings and

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[10] The *Tchacosh* case was itself followed by a different panel of the Ninth Circuit, including Judge, now Justice, Kennedy. *LPL Technical Services, Iran S.A., v. Parsons-Jurden International Corporation, et al.*, No. 85-2853, (9th Cir.) (December 8, 1986). The *LPL* opinion states that it is "not for publication" and "may not be cited to or by the courts of this [the Ninth] Circuit, except as provided by 9th Cir. R. 21." Thus, the identical issue presented here has been considered by three district judges and nine judges of the U.S. Court of Appeals, and all have come to the same conclusion.

analyses of other courts of appeals and by confusing different types of assets. The asset involved in this case is an alleged claim or debt payable in Iran for services rendered under a contract by an Iranian firm in Iran.[11] The only other cases to Respondent's knowledge involving similar claims for services rendered in a foreign country are the Ninth Circuit cases, *Tchacosh* and *LPL*, which come to the same result the Seventh Circuit did.

This case cannot be equated, as Petitioners do, to cases involving a bank account, a fund, or funds being held in the United States at the time of the confiscation or expropriation. *See Republic of Iraq*, 353 F.2d at 51; *Bandes*, 852 F.2d at 667. This case did not involve an account, or a fund or funds being held in the United States by Harza at the time of the expropriation.[12]

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[11] Petitioners assume there is a debt involved in this case, as opposed to a contract claim. If it is a contract claim, its situs would be Iran, the place of performance, *Tchacosh*, 766 F.2d at 1337-39, and the extraterritorial exception to the Act-of-State Doctrine would clearly not apply. Many of the cases relied upon by Petitioners involve undisputed debts or funds located in the U.S., rather than disputed contract claims like this one. *See, Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661 (2d Cir. 1988); *Republic of Iraq v. First Nat'l. City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Comments, especially *dicta*, and analysis in these cases as to the situs of undisputed "debts," would not apply to the disputed contract claim involved here.

[12] The application of the Act-of-State Doctrine is determined by the facts at the time of the expropriation. The "extraterritorial exception" to the Act-of-State Doctrine does not come into play merely because assets ultimately wind up in the United States after confiscation. *See, Banco Nacional de Cuba v.*

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This case is also different from cases involving goods located in the United States or payment for those goods, *Bandes, supra; United Bank, Ltd. v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. denied in part*, 425 U.S. 991 (1976), *rev'd on other grounds sub. nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968) *cert. denied*, 393 U.S. 924 (1968), and cases relating to the U.S. trademarks and copyrights. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1026-30 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972); *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified on other grounds*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd* 375 F.2d 1011 (2d Cir. 1967, *cert, denied*, 389 U.S. 830 (1967). None of these cases involved the kind of claim asserted here – namely, a claim for payment for services rendered by a foreign corporation in its home country. These decisions do not conflict in any way with either the results reached or the analysis by the Seventh Circuit in this case.

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Sabbatino, 376 U.S. 398 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). While Petitioners do not address the issue of timing, they appear to acknowledge that the proper focus is the "time of confiscation." (Petition 9-12). Thus, many facts recited by Petitioners, such as the award to Harza by the Hague Tribunal and payment of that award by Iran, are irrelevant to the Act-of-State analysis, since they occurred after the expropriation.

Petitioners argue that " '[f]oreigners entrusting their property to custodians in this country are entitled to expect this historic policy [against confiscations] to be followed save when the weightiest reasons call for a departure.' " (Petition 15). This quote originates in the *Republic of Iraq* case, 353 F.2d at 51-52, which involved a monetary deposit and stock certificates in a U.S. bank. The instant case does not involve a foreigner entrusting its property to a U.S. custodian. To the contrary, the payments involved in this case were to be made through a bank in Iran and were not entrusted by Petitioners to any U.S. custodian. (Pet. App. 25a). As Judge Posner correctly summarized, the cases relied on by Petitioners involved a legitimate concern on the part of the United States "with protecting property and transactions (perhaps even contemplated transactions, as in the two Second Circuit cases) within [U.S.] borders; that is the interest which underlies the extraterritorial exception to the act of state doctrine. That interest is not present here." (Pet. App. 11a).

Petitioners argue that the Seventh Circuit in this case (and the Ninth Circuit in the *Tchacosh* case) "significatly expand[ed] the scope of the Act-of-State doctrine" by adopting a new and different test. (Petition 7). In fact, what the Ninth and Seventh Circuits did was to resist attempts to eliminate the Act-of-State Doctrine. The claims and transactions involved here and in *Tchacosh* had no connection to the United States other than the location of the defendant debtor. Since virtually all Act-of-State cases in U.S. courts involve U.S. entities as debtor or defendant, adopting plaintiffs' arguments would eliminate the Act-of-State Doctrine in all such cases. Should

Petitioners prevail, the Act-of-State Doctrine would effectively become a nullity in United States courts. As Petitioners themselves have previously conceded:

> "[In *Tchacosh*, the] *only* connection with the United States was that [the defendant debtor] was a U.S. firm. The court rightly said if this were enough to displace the act of state doctrine, the doctrine would lose all meaning."

Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss or for Summary Judgment (R.30, p. 26).

Of course, there are many decisions in U.S. courts applying the Act-of-State Doctrine which involve U.S. debtors or defendants. *See, e.g., Sabbatino*, 376 U.S. at 428, 431 (1964); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977). If the fact that the debtor or defendant is a U.S. entity is sufficient to rule out application of the Act-of-State Doctrine, it would mean that these cases were wrongly decided. Even Petitioners do not argue this.

Petitioners' claim that the Seventh and Ninth Circuits adopted a new and different "creditor-oriented test," in contrast to a supposedly "time honored" "debtor-oriented test" is simply not true. The location or citizenship of the defendant or debtor has never been held by the U.S. Supreme Court to be dispositive in itself. To the contrary, the cases in which the Act-of-State Doctrine was adopted and developed by the U.S. Supreme Court involved U.S. debtors or defendants, yet the Act-of-State Doctrine was found to apply. *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Sabbatino, supra*.

In none of the cases cited by Petitioners has the court adopted the rule they propose, *i.e.*, "that the situs of a debt for Act-of-State purposes is with the debtor" regardless of the circumstances. To the contrary, the "teaching of the courts which have considered application of the Act-of-State Doctrine [is] . . . that the doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations." *Tchacosh*, at 1337, citing *Sabbatino*, 376 U.S. at 428; *United Bank, Ltd. v. Cosmic International, Inc.*, 542 F.2d 868, 874 (2d Cir. 1976); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968), *cert. denied*, 393 U.S. 924 (1968).

Employing this fluid test, some decisions have found the situs of a debt to be the same as the domicile of the debtor, while other decisions have found the situs of the debt to be other than the domicile of the debtor. These cases are not, as Petitioners suggest, in conflict; the results depend on different circumstances. All courts, including the Ninth Circuit in *Tchacosh* and the Seventh Circuit in this case, look at the totality of the circumstances. As Judge Posner noted, automatically concluding that the situs of the debt is with the debtor would greatly reduce the accepted scope of the Act-of-State Doctrine. "A dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm." (Pet. App. 10a-11a).

This case, as well as *Tchacosh*, represents an extreme set of facts in which there is virtually no nexus to the United States (and every connection to the expropriating state). As the Court in *Tchacosh* stated:

> "Appellant has advanced no case in which the nexus of the relevant relationship with a foreign country is so strong, and that with the United States so weak, in which a court has refused to give effect to the acts of the foreign state."

766 F.2d at 1338.

II. THE QUESTION OF SOLICITATION OF THE VIEWS OF THE EXECUTIVE BRANCH WAS NOT TIMELY OR PROPERLY RAISED BELOW.

Petitioners are incorrect in stating that this Court now has under consideration the question of whether the District Court should have sought the views of the State Department. Petitioners' reliance on the *Kirkpatrick* case for this proposition is misplaced. Solicitation of the Executive Branch's opinion is not at issue in *Kirkpatrick*. In *Kirkpatrick*, the views of the State Department *were* expressed, and there is no issue as to whether those views should have been sought.

The actual "question presented" on which certiorari was granted in *Kirkpatrick* deals with whether the Act-of-State Doctrine should be applied to bar a civil action brought to recover damages sustained as a result of losing a military construction contract with a foreign government allegedly because of bribery of an official of the foreign government. The *Kirkpatrick* case is completely dissimilar factually to the case at bar and to other expropriation cases.

Additionally, the question of solicitation of the views of the Executive Branch was never timely or properly raised below. Accordingly, this Court should not "review" that question. Petitioners raised this issue by

way of a letter submitted to the Court of Appeals only after all of the briefing in that court had occurred. This "supplemental authority" letter (Res. App. 1a), was not timely and violated Federal Rule of Appellate Procedure 28(j) and Seventh Circuit Rule 28(i). See footnote 8, *supra*.

Moreover, the Petitioners had ample opportunity to raise the issue in any one of the numerous pleadings they filed in the District Court. Having failed to do so, they were barred from raising it on appeal. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868 (1976) citing, *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719 (1941).

CONCLUSION

The Seventh Circuit properly interpreted and applied the Act-of-State Doctrine in this case. This was a straightforward expropriation case of the type that has been routinely decided without seeking the views of the State Department; there was no need to solicit the views of the State Department. Moreover, the issue was not raised in a proper or timely fashion in the lower courts. The Petition

for a Writ of Certiorari should be denied as to both questions.

Respectfully submitted,

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APPENDIX

APPENDIX

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April 7, 1989

BY FEDERAL EXPRESS

Mr. Thomas F. Strubbe, Clerk
U.S. Court of Appeals for the
Seventh Circuit
219 South Dearborn Street
Room 2722
Chicago, Illinois 60604

Re: *Farman-Farmaian, et al. v. Harza Engineering Co.*
Civil No. 88-3133

Dear Mr. Strubbe:

I write pursuant to F.R.A.P. 28 (j) and Circuit Rule 28 (i) to call to the attention of the Court the possible existence of what may be pertinent and significant authority.

Because the District Court's application of the Act of State doctrine relies on the court's appraisal of the foreign policy implications of this case, we provided a copy of

the decision to the Department of State, and we have now also provided to the Department copies of the briefs filed in this Court. We suggest that the Court ask the Department for its views on the need for the application of the doctrine in the context of this case, in light of the sharp disagreement of the parties on that question. Such a procedure has been followed in other cases in which such foreign policy concerns were involved, *see, e.g., Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1056-57, 1061-62 (3rd Cir. 1988).

Respectfully submitted,

/s/ John Vanderstar
John Vanderstar
Attorney for appellant

cc: Mr. Prior
Mr. Zak

Supreme Court, U.S.
FILED
FEB 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,

Petitioners,

v.

HARZA ENGINEERING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-867

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,

Petitioners,

v.

HARZA ENGINEERING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

I.

Respondent (Harza) seeks to persuade the Court that there is no conflict between the decision below and the decisions of the Second and Fifth Circuits, but it does not address the decisions of those courts.

None of those decisions turns on the "relationship" between the *creditor* and the *United States*. In fact, in many of the opinions the nature of that relationship is not even disclosed. Instead, in *each* of the cases the

court, after carefully reviewing the precedents and the purposes that underlie the Act of State Doctrine, zeroes in on the relationship between the *debtor* and the *foreign state*.

In view of Harza's artful effort to redefine (and make unrecognizable) our position on this point, we state that position again:

Where a foreign state expropriates without compensation an item of intangible property (such as a debt), the act should be recognized by a United States court only if the foreign state was able to convert the property to a tangible form (such as cash) within its own territory. The foreign state would not be able to do so if, as was the case here, the debtor was not present and had no assets in that state at the time of expropriation. In such a case, the situs of the intangible property is said to be where the debtor's assets can be reached.

Harza's Brief in Opposition never refers to this rule of law. It does not deny that the decision of the lower courts would have to have been different had this rule of law been applied. Most important, Harza never squarely recognizes the conflict between this traditional rule and the test applied by the Seventh Circuit in this case. Instead, it attempts to distinguish this case from the decisions on which we rely based on factors that played no role in those decisions.

Harza first points to the fact that most of the services that gave rise to the debt in this case were performed by petitioner (the creditor) outside the United States.[1] This, says Harza, makes this case different from those

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[1] The Ninth Circuit in *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333 (9th Cir. 1985), had also pointed to such facts in reaching the bewildering conclusion that Iran was *therefore* able effectively to seize a debt owed to the creditor by an American company. *Id.* at 1338.

that involved "a bank account, a fund, or funds being held in the United States," (Br. Opp. 11). This distinction seems to be based on Harza's view that such an account or fund is a physical object situated in the United States, which of course is not correct: A bank account or other "fund" is merely a debt.[2] Moreover, Harza cannot point to *any* language in *any* of the Second or Fifth Circuit cases which would make such a distinction relevant; indeed, in one case the court specifically noted that the debt owed to the appropriated Cuban company arose "out of a Cuban transaction," *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 713 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). Nor does Harza ever explain how the relationship between the creditor and the United States helps to determine when to apply the Act of State Doctrine. That Doctrine, after all, is generally traced back to this 1897 statement in *Underhill* v. *Hernandez*:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another *done within its own territory.*"

168 U.S. 250, 252 (1897) (emphasis added). In the well-known *Sabbatino* decision, the Court quoted this very language, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964), and elsewhere set forth the same concept in its own words:

> "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power *committed within its own territory.*"

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[2] *See Vladikavkavsky Ry.* v. *New York Trust Co.*, 189 N.E. 456, 459, 263 N.Y. 369 (N.Y. 1934).

> ". . . the Judicial Branch will not examine the validity of a taking of *property within its own territory* by a foreign sovereign government . . ."

Id. at 401, 428 (emphasis added). Just in the last few weeks this concept was reaffirmed by a unanimous Court:

> "The act of state doctrine . . . merely requires that, in the process of deciding, the acts of foreign sovereigns *taken within their own jurisdictions* shall be deemed valid."

W. S. Kirkpatrick & Co. Inc. v. *Environmental Tectonics Corp., Int'l.*, 58 U.S.L.W. 4140, 4143 (U.S. Jan. 17, 1990) (No. 87-2006) (emphasis added).

It is therefore plain that the question is not whether the acts of the *creditor* were carried out outside the United States, as Harza and the lower court seem to believe, but whether the act of the *foreign state* was completed in *its* territory The expropriation of a debt cannot be completed within the expropriating state's territory, if, as in this case, the debtor has no assets there. Therefore, the expropriation should not be recognized, and the case should go forward, inasmuch as the "courts in the United States have the power, and ordinarily the obligation, to decide cases properly presented to them." *Kirkpatrick*, 58 U.S.L.W. at 4143.

Harza attempts to harmonize the decision below with decisions of other circuits by relying on Judge Posner's declaration that "the interest which underlies the extraterritorial exception to the act of state doctrine" is the interest in protecting "property and transactions . . . within [United States] borders." (Pet. App. 11a, quoted at Br. Opp. 13)

But Harza and the lower court are in error.

Let us suppose that the petitioner Firm had owned a building in Brazil and that the Iranian government had purported to expropriate that asset as well. Even if

there were no relevant transactions within United States borders, there is no question that the courts of the United States would not be required by the Act of State Doctrine to give effect to that expropriation. The Act of State Doctrine would be inapplicable because the property Iran attempted to seize was not "property within its own territory," *Sabbatino*, 376 U.S. at 428. It is thus clear that a lack of connection between the United States and the transaction in question is not, and never has been, a necessary element of the territorial limitation contained in the Act of State Doctrine, and Judge Posner was in error in making it the dispositive criterion.

It may be that there are other doctrines or principles under which a court of the United States would decline to hear a case involving the expropriated Brazilian property of a foreign national. Concepts such as *forum non conveniens* come to mind. Judge Posner seemed to think that the Act of State Doctrine was another such principle of abstention, one that permits the court to decline to entertain a case when the judge decides that the "American interest" is too "attenuated." (Pet. App. 10a) But this Court has now made it crystal clear that "[t]he act of state doctrine is *not some vague doctrine of abstention* but a '*principle of decision* binding on federal and state courts alike.'" *Kirkpatrick*, 58 U.S.L.W. at 4142 (quoting *Sabbatino*) (first emphasis added; second emphasis in the original).[3] In that case, the Court rejected an at-

[3] Judge Posner's view of the Doctrine as a principle of abstention is also suggested by his apparent belief that his holding would reduce the number of such cases that "pop up" in United States courts. (Pet. App. 10a) But where, as here, the debtor is an American company with no asssets in the expropriating state, the claim is bound to "pop up" in the United States courts one way or another, whether it is brought by the perpetrator of the expropriation or its victim (unless, of course, the debtor is to enjoy a windfall). The only difference would be that, if Iran were to bring this suit, Harza would undoubtedly be relying on the decisions of the Second and Fifth Circuits to argue that Iran was not the rightful owner

tempted "expansion of the act of state doctrine . . . into new and uncharted fields," *id.* at 4143. In this case, Harza also urged such an "expansion," and this attempted expansion should have been rejected by the lower courts.[4]

Harza devotes much of its brief to showing that the Act of State Doctrine cannot be held inapplicable simply because the "debtor or defendant" is an American company. (Br. Opp. 13-15) It says that such a holding would render the Doctrine a nullity. (Br. Opp. 13-14)

The Act of State Doctrine would, of course, be meaningless under such an assumption. But even Harza recognizes that "[p]etitioners do not argue" this. (Br. Opp. 14) Our position, and that of the Second and Fifth Circuits, is that the Doctrine is inapplicable if the expropriating state was not in a position to convert the debt at issue into cash within its own territory. In other words, the impact of the Doctrine cannot be avoided here by showing only that Harza is a United States entity that can be sued in this country; the dispositive fact is that Harza was not present and did not have assets within the territory of Iran at the time of the expropriation. The Second and Fifth Circuit cases on which we rely make that perfectly clear, as the Petition plainly states (Pet. 8-10). We made such a showing, and Harza does not even say, let alone show, otherwise.

Harza argues that the Act of State Doctrine is a "fluid" one that should be applied "pragmatically and flexibly, with reference to its underlying considerations." (Br. Opp. 15, quoting from *Tchacosh*). It is of course true, as the Court said very recently, that "the policies

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of the property at issue here. One way or the other, a United States court would have to determine whether the asset belongs to petitioners or to Iran.

[4] On this point, the conflict between *Kirkpatrick* and the lower court's decision in this case is so clear that the Court may wish to vacate and remand for further consideration in light of *Kirkpatrick*.

underlying the act of state doctrine may not justify its application" in a particular case, *Kirkpatrick*, 58 U.S.L.W. at 4143. This "flexibility" may thus warrant a *narrowing* of the Doctrine, but not its broadening. No court prior to *Tchacosh* had ever broadened the Doctrine, as the Seventh Circuit did here, by determining that the key "underlying consideration" is whether the case has a stronger "nexus" to the United States than to the expropriating country. (Br. Opp. 15-16) The threshold issue under the Doctrine is whether the foreign state expropriated "property within its own territory," *Sabbatino*, 376 U.S. at 428. The view of the Ninth and Seventh Circuits—that the lack of a "nexus" between the creditor's activities and the United States calls for application of the Doctrine—is squarely in conflict with the test that has been followed at least since 1965, when Judge Friendly wrote for the court in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Under that test—did Harza have assets in Iran to which the expropriation could apply?—a very different result would have been produced in this case.[5] That result would have been far more consistent with the recently reaffirmed principle that the "[c]ourts in the United States have the power, and ordinarily the obligation, *to decide cases* properly presented to them," *Kirkpatrick*, 58 U.S.L.W. at 4143 (emphasis added).

II.

The second contention in our Petition was that this Court should reverse the Seventh Circuit's failure to seek the views of the Executive Branch before deciding that

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[5] As we pointed out (Pet. 2-3 & n.1), there were some disputes of fact which the lower courts—contrary to unimpeachable authority—resolved in favor of Harza, despite the fact that it was the party that moved for summary judgment. However, because the facts regarding "relative nexus" are not material, we do not comment on respondent's charge that our petition "distorts" the record or its claim that its version of the "facts" was found to be "undisputed" by both courts below.

to entertain this private contract dispute would be "a slap in the face of Iran" and thus would injure the foreign relations of the United States. Harza does not take issue with the merits of our position, and of course Harza cannot deny that the United States explicitly supported this position in its *amicus* brief in *Kirkpatrick*.[6]

Harza makes only one point on this question: that the issue was not properly raised below. Harza does not contend that this point is *jurisdictional* or that this Court is somehow barred by its rules from considering petitioners' argument. Nor does Harza deny that the court of appeals was aware of our position that it should seek the views of the Executive Branch. Instead, Harza relies exclusively on two cases that relate to the circumstances under which a court of appeals will consider an argument raised for the first time on appeal.

This is indeed a curious position.

The principal case Harza cites, *Singleton* v. *Wulff*, 428 U.S. 106 (1976), expressly holds that there is "no general rule" regarding when an appellate court may take up for the first time an issue not raised below and that such matters are left "primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. Harza also notes that *Singleton* cited the *Hormel* v. *Helvering* decision, 312 U.S. 552 (1941) (Br. Opp. 17), in which this Court *upheld* the appellate court's decision to consider an argument first raised on appeal, observing that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them," 312 U.S. at 557.[7] In this

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[6] The Court did not consider this issue in *Kirkpatrick* because the lower court there had sought the views of the Executive Branch before deciding the Act of State issue.

[7] Courts of appeals properly consider arguments first raised on appeal in at least three kinds of cases:

—when the argument in question "'. . . is purely one of law and . . . does not affect or rely upon the factual record

case, the issue was raised below—twice—and "the ends of justice" would not be promoted by refusing to consider it merely because it was not contained within the four corners of our briefs.

Moreover, even if the issue had never been presented to the court of appeals, this Court has on numerous occasions considered such issues, especially if they are "purely legal" ones. *See, e.g., Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980). This is particularly the case where the issue is whether a prior decision of this Court should be overruled. *E.g., Blonder-Tongue Lab., Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971). That is this case. We are contending that the Court should adopt a rule it declined to adopt in *Sabbatino*, namely, that a court should never refuse to hear a case on the ground that doing so would interfere with the foreign relations of the United States unless it has first received the views of the Executive Branch on that point.

Harza makes no effort to deal with the implications of its claim that this issue is not properly before the Court,

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developed by the parties'," *Hansen* v. *Morgan*, 582 F.2d 1214, 1217 (9th Cir. 1978), quoting *United States* v. *Patrin*, 575 F.2d 708, 712 (9th Cir. 1978); *Foster* v. *United States*, 329 F.2d 717, 718 (2d Cir. 1964).

—when the matter involves important questions of public policy, *Olegario* v. *United States*, 629 F.2d 204, 216 n.8 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *Green* v. *Brown*, 398 F.2d 1006, 1009 (2d Cir. 1968).

—when "injustice might otherwise result," *Hormel* v. *Helvering*, 312 U.S. at 557.

It requires no discussion or analysis to see that the present case fits into all three of these categories: whether a court should determine that adjudicating the case before it will interfere with the foreign relations of the United States is purely a question of law, it is of considerable public importance, and injustice would surely result if this Court should fail to address the question in this case.

and it is obvious why it has not done so after one considers the fallacy of its position.

Thus, the matter is ripe for disposition by this Court.

CONCLUSION

The Court should grant the petition and set the case down for briefing and argument or vacate the decision below and remand for further consideration in light of *Kirkpatrick*.

Respectfully submitted,

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(4)

No. 89-867

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In the Supreme Court of the United States

OCTOBER TERM, 1989

F. & H. R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM, ET AL., PETITIONERS

v.

HARZA ENGINEERING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the act of state doctrine required dismissal of this suit.

2. Whether the courts below were required, prior to ruling on the act of state issue in this case, to solicit the views of the Executive Branch concerning the impact of the decision on the foreign relations of the United States.

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HARZA ENGINEERING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In the 1960s, respondent Harza Engineering Company contracted with the Government of Iran to provide engineering services for water and power projects in Iran. Under the contract, respondent was required to associate with an Iranian engineering firm. Accordingly, on October 1, 1964, respondent entered into a collaboration agreement with petitioner Farman-Farmaian Consulting Engineers Firm (Consulting Firm), which was to represent respondent in negotiations with the Iranian Government, provide local staff and facilities at regional offices, and perform emergency services in the Teheran office.

Under the agreement, all services by the Consulting Firm were to be performed in Iran, all invoices for those services were to be sent to respondent's office in Teheran with copies to Harza's

Chicago office, and payments were to be made in Iranian rials through Iranian banks. The Consulting Firm was not, however, entitled to receive payment for its services until Harza first received payment from the Iranian Government. Petitioner Farough Farman-Farmaian, the managing director of the Consulting Firm, subsequently pressed to have a small portion of the payments made in dollars and attributed to "work outside Iran," presumably to avoid Iranian taxes. In addition, he occasionally visited respondent's Chicago offices to discuss the projects while he was visiting his children in the United States. Most payments, however, were made to Farough Farman-Farmaian in rials through Iranian banks in which Harza maintained accounts, and all financial records relating to payments in rials were maintained in Harza's office in Iran. Pet. App. 2a-3a, 16a-17a, 25a-27a.

Work on the various construction projects continued throughout the 1970s. In 1978, just prior to the Iranian revolution, petitioner Farough Farman-Farmaian left Iran. He now resides in London. In 1979, the new Government of Iran enacted a Temporary Directors Act, which provided for appointment of temporary directors for Iranian companies if the directors had abandoned their company or could not be reached or if the company had suspended its work. Under the Act, the Iranian Government, beginning on August 6, 1979, appointed a series of temporary directors for the Consulting Firm. Those directors were vested with full authority to manage the Firm's affairs, to the exclusion of petitioner Farough Farman-Farmaian. Pet. App. 17a, 19a & n.1. In 1980, the Government of Iran adopted an "Act Concerning the Management and Ownership of Shares of Contracting and Consulting Firms," which authorized a cabinet-level commission to determine which such Iranian firms should be continued or dissolved. The commission decided that the Consulting Firm should be dissolved, and it appointed a Board of Liquidators for that purpose in January 1982. During the period of liquidation, which apparently has not been completed (*id.* at 18a, 22a), the Board of Liquidators enjoys full and exclusive authority over the Consulting Firm, including all rights to bring lawsuits on its behalf. *Id.* at 17a.

Respondent ceased its operations in Iran in 1980 because the Iranian Government failed to pay for services rendered on the water and power projects. In 1986, respondent received an award of $8,416,805.86 for this work from the Iran-United States Claims Tribunal. Pet. App. 18a; see *Harza* v. *Iran*, 11 Iran–U.S. Claims Trib. Rep. 76, 137 (1986).

2. In 1987, petitioners commenced this suit against respondent in the United States District Court for the Northern District of Illinois, seeking approximately $2 million for services rendered by the Consulting Firm in connection with the work that formed the basis of the Tribunal's award to respondent. Petitioner Farough Farman-Farmaian sued on his own behalf and on behalf of the other owners of the Consulting Firm, who gave him power of attorney to prosecute this suit. Invoking the court's alien diversity jurisdiction, 28 U.S.C. 1332(a)(2), petitioners stated claims for breach of contract and unjust enrichment. Pet. App. 2a, 15a-16a.

a. The district court granted respondent's motion to dismiss the complaint. Pet. App. 16a-28a. It first held that petitioner Farough Farman-Farmaian had been divested of his capacity under Iranian law to sue on behalf of the Consulting Firm, rejecting his contention that the actions of the Iranian Government did not comply with the Iranian Constitution and laws. *Id.* at 18a-23a.[1]

The court further held that the actions of the Iranian Government must be given effect under the act of state doctrine. Pet. App. 23a-28a. The court recognized that the doctrine requires a United States court to give effect only to the acts of a foreign sovereign "within its own territory," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964), and that a United States court should not give effect in the United States to a foreign confiscatory decree because to do so would be inconsistent with the public policy of this Nation against uncompensated takings of private property. Pet. App. 23a-24a. But the court concluded that these principles would not be violated if the actions of the

[1] Petitioners no longer challenge the actions of the Iranian Government under Iranian law. See Pet. 12-13.

Iranian Government under its 1979 and 1980 laws were given effect as the rule of decision in this case, because "all of the functional elements of the relationship [between the parties] were centered in Iran," and therefore "Iran was in a position to 'perform a *fait accompli*' over the payment or receipt of any money owed the [Consulting Firm] by [respondent]." *Id.* at 26a (citing *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333, 1338 (9th Cir. 1985), and *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), cert. denied, 393 U.S. 924 (1968)).

The court found it especially significant that respondent had not been paid by Iran at the time of the expropriation and did not receive payment until 1986 (through the Iran-United States Claim Tribunal). Because the Consulting Firm was not entitled to compensation under its contract with respondent until respondent first received payment from Iran, the Consulting Firm's entitlement to compensation for its services "did not mature until *after* the expropriation and *after* the [Consulting Firm] was controlled by the government." Pet. App. 27a. The court could "find little difference between this and those cases wherein the claim for which payment is sought was created by the shipment of goods *after* the expropriation occurred. In those cases, the claim is deemed to belong to the expropriated company that shipped the goods." *Ibid.*

Against this background, the court summarized its reasons for concluding that "[t]he principles underlying the Act of State doctrine require that it be invoked under the circumstances of this case": "[t]he United States has no connection to the relationship between the parties except that Harza has an office here": "[t]he contract claim on which Farough sues matured entirely in Iran after the expropriation of the [Consulting Firm]"; respondent "had no property or assets of the [Consulting Firm] within the United States, and * * * the government of Iran acquired all rights to claim or sue for property or assets owed by [respondent] to the [Consulting Firm] arising from the subcontract for services in Iran." Pet. App. 27a-28a.

b. The court of appeals affirmed, Pet. App. 1a-11a, agreeing with the district court that the act of state doctrine barred

petitioners' claims. *Id.* at 8a-11a.[2] The court rejected petitioners' contention that the extraterritoriality exception to that doctrine permitted adjudication of their claims. It reasoned that "the confiscation was complete within the foreign state in the sense that all of the [Consulting Firm's] assets and operations were there"—including "the firm's claim against Harza for payment for the services that the firm had rendered Harza in Iran." *Ibid.* The court relied upon the Ninth Circuit's decision in *Tchacosh*, which "rejected the extraterritoriality exception to the act of state doctrine on facts almost identical to those of the present case." *Id.* at 9a. The court also distinguished two Second Circuit decisions cited by petitioners, *Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661 (1988), and *United Bank Ltd.* v. *Cosmic International, Inc.*, 542 F.2d 868 (1976), on the ground that "in each a shipment of goods to or from the U.S. was contemplated," while in the instant case, "all the services under the contract were to be performed in the foreign country." Pet. App. 8a-9a.

The court acknowledged that its description of the Consulting Firm's claim for payment of respondent's debt as an asset located in Iran "may be thought to beg the question." But it regarded the converse proposition—that the "debt was 'in' Chicago"—as "untenable," since it would be "strange to describe the Consulting Firm as having an 'American' asset by virtue merely of having a claim against an American company for services performed on that company's behalf in Iran." Pet. App. 9a. The court also thought that the latter proposition "would if accepted greatly reduce the accepted scope of the act of state doctrine," since a "dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm." *Id.* at 9a-10a. The court instead believed it was necessary to look to

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[2] In disposing of a threshold question of diversity jurisdiction, Pet. App. 6a-8a, the court accepted the "principle * * * that corporations expropriated abroad continue to exist with capacity to sue in the United States, provided * * * they can show that the court can disregard the expropriation without violating the act of state doctrine." *Id.* at 7a. Respondent does not question that principle.

"the interest which underlies the extraterritorial exception to the act of state doctrine"—namely, the "independent concern [of the United States] with protecting property and transactions * * * within its borders." *Id.* at 11a. "That interest," the court concluded, "is not present here." *Ibid.* Nor did the court believe that a contrary result was required because of the possibility that respondent might realize a windfall. The court first noted that any such windfall was speculative, because respondent did not concede that it was indebted to anyone and the liquidators in Iran might still make a claim against respondent. But the court stressed that it was not in any event authorized "to disregard an act of the Iranian state against an Iranian firm the contemplated and actual operations of which were confined to Iran, which [firm] had no assets outside of Iran, and which was seized in Iran pursuant to locally valid Iranian law." *Ibid.*

DISCUSSION

The courts below reasonably concluded that petitioners' suit, based on the Consulting Firm's contract claim arising in Iran for services performed there, is barred by the act of state doctrine. The decision below does not conflict with any decision of this Court or any other court of appeals. To the contrary, it is fully consistent with and relies upon *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333 (9th Cir. 1985), the only other decision of a court of appeals to have addressed the "extraterritorial exception" to the act of state doctrine in similar circumstances. The lower courts are generally resolving questions concerning the territorial reach of the act of state doctrine in a consistent manner that comports with the underlying purposes of the doctrine. Those questions therefore do not warrant review at this time.

1. a. The act of state doctrine requires courts in the United States to "deem[ ] valid" and apply as the " 'rule of decision' " in cases before them the "acts of foreign sovereigns taken within their own jurisdictions." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 110 S. Ct. 701, 705, 707 (1990) (quoting *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310 (1918)). Put another way, the doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a

recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). See also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 706 (1976) (plurality opinion); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). The act of state doctrine has been variously described as "resting upon 'the highest considerations of international comity and expediency,' " as well as the "domestic separation of powers, reflecting the 'strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Kirkpatrick*, 110 S. Ct. at 704 (quoting *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918), and *Sabbatino*, 376 U.S. at 423). In short, the doctrine "effectuate[s] general notions of comity among nations and among the respective branches of the Federal Government." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion).

The Court's formulations of the act of state doctrine have consistently included a limiting principle of territoriality. That is, in order to be recognized as binding upon the judiciary, the act of a foreign sovereign must be complete within its own territory. *Kirkpatrick*, 110 S. Ct. at 704; *Sabbatino*, 376 U.S. at 401; *Underhill*, 168 U.S. at 252. This limitation is consistent with the doctrine's underlying purposes and rationale. Principles of international comity supporting application of foreign law in other settings weigh far less heavily when the foreign sovereign act purports to affect property situated in the United States and presumptively subject to its laws and public policies, including those prohibiting uncompensated takings. Similarly, " '[t]he obvious inability of a foreign state to complete an expropriation of property beyond its borders reduces the foreign state's expectations of dominion over that property,' " and "[c]onsequently, the potential for offense to a foreign state is reduced, as well as the need for judicial deference to other branches of government." *Tchacosh*, 766 F.2d at 1337 (quoting *Maltina Corp.* v. *Cawy Bottling Co.*, 462 F.2d 1021, 1028 (5th Cir.),

cert. denied, 409 U.S. 1060 (1972)); see Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594, 605-610 (1986).

By virtue of this limitation on the act of state doctrine, when the act of a foreign sovereign purports to affect legal relationships or property in the United States, a United States court will give effect to that act as a rule of decision only if the act is "consistent with the policy and law of the United States." *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966) (quoting Restatement of Foreign Relations Law § 46 (Proposed Official Draft 1962)). See also *Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661, 666-667 (2d Cir. 1988); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1121 & n.29 (5th Cir. 1985). Accordingly, if a foreign sovereign purports to expropriate property in the United States without payment of compensation, the act of state doctrine is inapplicable and the expropriation ordinarily will not be given effect by a United States court (because it is inconsistent with the public policy embodied in the Just Compensation Clause of the Fifth Amendment). *Bandes*, 852 F.2d at 667; *Republic of Iraq*, 353 F.2d at 51; *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N.Y. 369, 378, 189 N.E. 456, 460 (1934).[3]

Petitioners contend (Pet. 6-16) that the court of appeals in this case violated the territorial limitation on the act of state doctrine by giving effect to Iran's expropriation of the Consulting Firm insofar as the expropriation applied to the Firm's

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[3] This is not an absolute rule. In *United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942), the Court gave effect to the Litvinov Agreement, under which the United States, as an incident to the recognition of the Soviet Union, procured an assignment of the Soviet Union's claim to assets in the United States belonging to nationalized Russian companies; those assets were to be used to pay the claims of United States nationals whose property in the Soviet Union had been confiscated. In *Republic of Iraq*, the Second Circuit explained the result in *Belmont* and *Pink* on the ground that the President's actions, pursuant to his constitutional authority to conduct the foreign relations of the United States, made the Soviet expropriation decrees consistent with the law and policy of the United States from that time forward. 353 F.2d at 52.

claim against respondent.[4] Their argument proceeds as follows: the property at issue here is the "debt" respondent allegedly owes the Consulting Firm for services the latter performed in Iran; the situs of that debt is Chicago because that is where respondent's offices are; and the Iranian decree expropriating the Consulting Firm could not reach that property because it is not in the territory of Iran. In petitioners' view (Pet. 6-11), the Seventh Circuit's failure to adopt this reasoning places it is "irreconcilable conflict" with decisions of the Second and Fifth Circuits. We disagree. The decision below represents, in our view, a reasonable application of the territorial component of the act of state doctrine and presents no "irreconcilable conflict" with other cases.

b. In many—perhaps most—situations, the situs of property for purposes of the act of state doctrine will be clear. Certainly that is so in the case of real property, and usually of tangible personal property as well. Some intangible personal property may present more difficult problems because "[t]he situs of intangible property is about as intangible a concept as is known to the law." *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.), cert. denied, 393 U.S. 924 (1968). Nevertheless, established law and custom provide concrete guidance for some such property. For example, trademarks consistently "have been held to be strictly territorial in the state of registry, so that former owners of marks registered in the United States could claim rights to them against those claiming under an act of a foreign state." Restatement (Third) of Foreign Relations Law § 443, reporters' note 4, at 375-376 (1986); *Maltina*, 462 F.2d at 1026; *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 594-597 (1911). For other types of intangible property, it may be necessary to take account of the course of dealing between the parties, the nexus of the transaction to the United States and the foreign state, and the purposes underlying the act of state doctrine. This approach is consistent with this Court's

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[4] Both parties and the courts below have regarded the Iranian Government's actions in divesting the prior owners of authority over the Consulting Firm and subsequently dissolving it as effecting an expropriation of the Firm. Pet. i, 3; Br. in Opp. i, 6; Pet. App. 3a, 27a. We shall do the same.

refusal in *Sabbatino* to lay down an "inflexible and all-encompassing rule" for resolution of all act of state cases. 376 U.S. at 427-428. Under this approach, the courts have developed workable rules and principles for addressing the territorial component of the act of state doctrine as applied to particular categories of intangible property, such as bank deposits and funds or accounts receivable that are tied directly to goods shipped to or from the United States. See pages 15-16, *infra*.

The particular type of intangible property at issue in this case is an unliquidated claim for breach of contract or unjust enrichment based on services rendered in a foreign country. As a matter of Iranian law, the expropriation of the Consulting Firm prevents the Firm (and petitioner Farough Farman-Farmaian on its behalf) from prosecuting that claim. If the expropriation decree is regarded as operating solely on the *claim*, it would be reasonable to conclude that the act of state doctrine applied. The territorial limitation on that doctrine would not be triggered because a nation ordinarily may exercise sovereign authority over the claims of its own nationals against foreign parties, see *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981),[5] and the "situs" of such a claim for act of state purposes therefore could properly be deemed to be the domicile of the claimant, which in this case is in Iran. Petitioners, however, believe that the question of territoriality should be viewed not from the perspective of the party that owned the claim (the Consulting Firm), but from the perspective of the party that allegedly is liable on the claim (respondent). In petitioners' view, that liability should be regarded

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[5] In *Dames & Moore*, the Court sustained the President's settlement of the claims of United States nationals against Iran through the establishment of the Tribunal, 453 U.S. at 675-688, and it treated those claims as a species of property protected by the United States Constitution, *id.* at 688-690, even though, under petitioners' theory, the property in question might as easily have been regarded as the "debts" owed by Iran on those claims – property that, in petitioners' view, would have a situs in Iran. Any rules of situs fashioned by the courts for purposes of the territorial component of the act of state doctrine must preserve the constitutional authority of the President or Congress to act upon the foreign claims of United States nationals as they have done in the past and to insist that those acts by the United States are respected by other nations.

as a "debt," [6] and the situs of the debt should be deemed to be the domicile of the "debtor"—in this case, Chicago, where respondent has its offices. Under this theory, the Iranian decree purported to expropriate property whose situs was outside the territory of Iran, and it therefore cannot be given effect under the act of state doctrine.

As is evident, these two views of the territorial issue—one focusing on the claim, the other on the debt—are opposite sides of the same coin. We believe that to adopt one view or the other as an unyielding rule governing all cases could, in some circumstances, defy common sense and accord insufficient weight to the purposes of the act of state doctrine. We therefore are reluctant to endorse an inflexible rule that looks only to whether the "debtor" is domiciled in the United States. In fact, in the cases upon which petitioners rely, there were aspects of the transaction—in addition to the domicile of the "debtor"—that had a substantial nexus to the United States. See pages 15-16, *infra*. By contrast, in this case, where such further contacts in the United States are lacking, there is much force to the court of appeals' common sense observation that "it is strange to describe the Consulting Firm as having an 'American' asset by virtue merely of having a claim against an American company for services performed on that company's behalf in Iran." Pet. App. 9a. That result is not compelled either by precedent or by the purposes of the act of state doctrine.

c. In seeking to "localize" the situs of a debt for act of state purposes, some decisions have expressed the view that "a debt is not located within a foreign state unless that state has the power to enforce or collect it." *Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), rev'd on other grounds *sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, (1976). Accord *Bandes*, 852 F.2d at 667; *United Bank Ltd.* v. *Cosmic Int'l, Inc.*, 542 F.2d 868, 873 (2d Cir. 1976); *Republic of Iraq*, 353 F.2d at 51. Because the "power to enforce

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[6] Compare *Pennsylvania Dep't of Public Welfare* v. *Davenport*, No. 89-189 (May 29, 1990), slip op. 4 (quoting 11 U.S.C. 101(11) (for purposes of the Bankruptcy Code, "debt" means "liability on a claim")).

payment of a debt * * * generally depends on jurisdiction over the person of the debtor" (*Menendez*, 485 F.2d-at 1365, citing *Harris* v. *Balk*, 198 U.S. 215 (1904),[7] and Restatement (Second) of Foreign Relations Law § 43, comment d (1965)), these cases have usually found the situs of the debt to be the "situs" of the debtor.

The Fifth Circuit crafted a somewhat different formulation in *Tabacalera*: whether the foreign government "was * * * physically in a position to perform a *fait accompli*" with respect to the transaction—*i.e.*, whether the act at issue "is an accomplished fact, that is when [the foreign government] has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*." 392 F.2d at 715. See also *United Bank*, 542 F.2d at 874; *Maltina*, 462 F.2d at 1028. In these cases, the courts found that the act of state could not "come to complete fruition within the dominion of the [foreign state]" (*Tabacalera*, 392 F.2d at 715-716) and that the foreign sovereign therefore was not in a position to "perform a *fait accompli*" with respect to the intangible at issue. The result in these cases was generally consistent with a rule locating the situs at the domicile of the defendant-debtor.

However, contrary to petitioners' assertion (Pet. 10), the Second and Fifth Circuits have not inflexibly adhered to either the analytical approach or the debtor-oriented result petitioners urge. For example, in *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1123 (1985), the Fifth Circuit determined that strict adherence to its "*fait accompli*" formulation in the context of a foreign state's seizure of the assets of its own debtor-bank would unduly expand the act of state doctrine beyond what *Tabacalera* had intended, because "the act of state doctrine would apply whenever a foreign state seized assets owed by its bank, no matter how many ties the debts had to this country." *Ibid.* The court instead focused on whether the relationship between the parties' obligations and the foreign sovereign was "sufficiently close"

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[7] The due process holding in *Harris* v. *Balk*, though not its debt-situs analysis, has been substantially overruled by *Shaffer* v. *Heitner*, 433 U.S. 186, 212 n.39 (1977). See *Burnham* v. *Superior Court*, No. 89-44 (May 29, 1990) slip op. 13-16 (plurality opinion).

to warrant recognition of the foreign sovereign act, concluding that "the proper test for determining situs is where the incidents of the debt, as a whole, place it." The court then looked to various factors ("place of payment, intent of the parties (if any)," etc.) to "determine the extent of the foreign government's interest in the debt." *Id.* at 1123-1124.

Similarly, in *Allied Bank Int'l* v. *Banco Credito Agricola*, 757 F.2d 516, 521-522, cert. dismissed, 473 U.S. 934 (1985), the Second Circuit, after inquiring into whether the purported taking came to "complete fruition" in the foreign country, conducted a separate situs analysis, examining various incidents of the transaction (place of payment, place of negotiation, etc.), as well as the interests of the respective sovereigns in that transaction. And contrary to petitioners' assertion (Pet. 7, 8) that the courts of appeals had uniformly followed a "debtor-oriented" approach to these questions prior to the Ninth Circuit's decision in *Tchacosh*, the Second Circuit in *Allied Bank* concluded that the situs of the debt was at the *creditor's* location (New York), not that of the debtor-banks (Costa Rica). 757 F.2d at 522. Compare *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985) (finding situs of deposit in foreign country).

In sum, recent decisions suggest some willingness on the part of the courts of appeals, in appropriate circumstances, to eschew formulaic solutions to the situs issue in act of state cases in favor of an examination of the relationship between the parties' obligations and the foreign sovereign, as well as the interest of the foreign sovereign in application of the rule of decision embodied in its act of state. The earlier cases discussed above sought—somewhat in the manner of the First Restatement of Conflict of Laws—to identify "some single significant factor in [the] transaction" that would "identify the place * * * whose law should govern the transaction." See R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* § 86, at 255 (1986). However, much as American conflict-of-laws principles have departed from strict adherence to territorially based "vested rights" theories in favor of an "interest analysis," as in the Second Restatement of Conflict of Laws (see R. Leflar, L. McDougal & R. Felix, *supra*, §§ 90-91, at 264-270), *Callejo* and *Allied Bank* ad-

dressed the territorial component of the act of state doctrine in a less rigid fashion; those more recent cases have instead sought to identify the state with the "most significant relationship" to the transaction at issue (R. Leflar, L. McDougal & R. Felix, *supra*, § 90, at 266-270). See Note, *supra*, 86 Colum. L. Rev. at 601-605.

d. We by no means suggest that the courts, in applying the act of state doctrine, should abandon concepts of territoriality in favor of an amorphous interest analysis patterned after modern conflict-of-laws principles. But we do believe that the interest analysis developed in the analogous conflict-of-laws context sheds light on the proper *application* of the territorial component of the act of state doctrine. In particular, consideration of the respective interests of the United States and Iran, as well as the underlying purposes of the act of state doctrine, support the court of appeals' decision not to apply a rigid, debtor-oriented rule in the circumstances of this case.

The court below rejected the argument that respondent's mere presence in the United States was sufficient to render the act of state doctrine inapplicable. The court noted that such a proposition would "greatly reduce the accepted scope of the act of state doctrine," since "[a] dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm." Pet. App. 9a-10a. Moreover, the "American interest" in the parties' transactions here was "attenuated," since "all the services under the contract were to be performed in the foreign country," "all of the firm's assets and operations were there," *ibid.*, and payment was to be made primarily in rials through Iranian banks. Compare *Allied Bank*, 757 F.2d at 518-519, 521 (attaching significance to parties' agreement concerning place and manner of payment); *Braka*, 762 F.2d at 224-225 (same). Although the "United States has an independent concern with protecting property and transactions * * * within its borders," that "interest is not present here," because "[w]hat is at issue * * * is the propriety of dealings between the Iranian government and an Iranian corporation." Pet. App. 10a-11a. Because "all of the functional ele-

ments of the [parties'] relationship were centered in Iran," the court of appeals reasonably concluded that the territorial limitation did not preclude giving effect to the expropriation in this case. *Id.* at 11a, 25a-26a.

The decision below is consistent with the ruling by the Ninth Circuit on virtually identical facts in *Tchacosh*. There, all relevant aspects of the parties' transaction likewise were located in Iran, with the sole exception of the defendant-debtor's domicile. 766 F.2d at 1338. Under these circumstances, the court rejected the plaintiff's attempt to "localize" the debt in the United States, observing that in "no case" had "a court * * * refused to give effect to the acts of the foreign state" where "the nexus of the relevant relationship with a foreign country is so strong, and that with the United States so weak." *Ibid.* Looking instead to the policies underlying the act of state doctrine, the court concluded that "the relations between [plaintiff] and [defendant] have a far greater impact upon Iran than upon the United States." *Ibid.*[8]

e. Against this background, despite the somewhat varying verbal formulations used in some Second and Fifth Circuit cases, there is no circuit conflict on the territorial component of the act of state doctrine that warrants review by this Court. Three factors support this conclusion:

First, as respondent notes (Br. in Opp. 10-12), in the other act of state cases upon which petitioners rely (see Pet. 8-11), the transaction had a substantial nexus to the United States—and specifically to property physically located in the United States—*in addition to* the mere presence of the debtor-defendant. See *Bandes*, 852 F.2d at 664-665 (claims to funds present in United States as payment for United States goods ordered but not shipped to foreign country at time of expropriation); *United Bank*, 542 F.2d at 870-871 & n.2 (claim to funds held in United

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[8] In this case, unlike in *Tchacosh*, the agreement between the parties provided that it was governed by domestic (Illinois) rather than foreign law. See Pet. 2. We do not believe that contractual provision requires a different result here, since implementation of the contract occurred entirely in Iran and an agreement between private parties regarding the law that defines their contractual relationship does not in any event alter the power of a government (Iran) to take whatever property rights arise out of that relationship.

States to pay for goods shipped to United States prior to expropriation); *Menendez*, 485 F.2d at 1360, 1364, 1370 (claim of right to payment for goods shipped to United States prior to expropriation); *Tabacalera*, 392 F.2d at 707 (same); *Maltina*, 462 F.2d at 1028 (trademark registered in United States); *Republic of Iraq*, 353 F.2d at 51 (deposit in and stock held by United States bank).[9] By contrast, in *Tchacosh* and the instant case, the courts concluded that the only significant United States contact was the defendant's presence. 766 F.2d at 1338 & n.6; Pet. App. 9a-11a, 26a. Indeed, the court below distinguished *Bandes* and *United Bank* on these very grounds. *Id.* at 9a.

Second, specifically relying on the Fifth Circuit's decision in *Tabacalera*, the court of appeals in *Tchacosh* and the district court in the instant case both concluded that because all of the functional elements of the relationship were centered in Iran, the Iranian Government was in a position to "perform a *fait accompli*" concerning the payment or receipt of any money respondent owed the Consulting Firm. 766 F.2d at 1338; Pet. App. 26a. This obviously undermines petitioners' contention (Pet. 7, 9-10) that the result in this case and *Tchacosh* conflicts with *Tabacalera*.

Third, utilization of an "interest analysis"-type approach in the particular circumstances of *Allied Bank* and *Callejo* suggests that, contrary to petitioners' premise, the Second and Fifth Circuits might well agree with the result reached by the court below and the Ninth Circuit in *Tchacosh*. Following that approach in

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[9] Petitioners also rely (Pet. 9 n.7) on *Vishipco Line* v. *Chase Manhattan Bank*, 660 F.2d 854, 8612 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982), but that case was not decided on act of state grounds. See U.S. Amicus Br. (at 10-14) in *Chase Manhattan Bank, N.A.* v. *Vishipco Line*, 459 U.S. 976 (1982). The Second Circuit held in *Vishipco* that a bank account in Citibank's Saigon branch "sprung" back to Citibank's home office in New York when Citibank closed the Saigon branch, prior to any seizure by local Vietnamese authorities. For the reasons stated in our amicus brief (at 26-27 & n.21) in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260 (May 29, 1990), that theory of liability in *Vishipco* is wrong. The closure of the branch in Saigon did not change the situs of the debt; rather, if the closure of the bank and the resulting refusal of a demand for payment were wrongful, the depositor had a cause of action for damages in New York for breach of contract. See *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 405 n.17 (1965) (Harlan, J., dissenting).

the circumstances of this case would be consistent with the purposes and rationale of the act of state doctrine because, as the court of appeals observed (Pet. App. 10a-11a), both international comity and the risk of offense to a foreign sovereign (and resulting interference with the conduct of foreign relations by the Executive Branch) weigh more heavily in favor of giving effect to the foreign sovereign act when the interests of the United States are attenuated and those of the foreign sovereign substantially predominate.

f. Finally, even if the "situs" issue petitioners raise might warrant review at some point, this is not the right case in which to address that issue. The district court concluded that because the Consulting Firm was entitled to receive payment from respondent only after respondent first received payment from Iran—and because respondent had not received payment from Iran at the time of the expropriation—the Consulting Firm's claim against respondent matured only *after* the expropriation. Pet. App. 27a. Whatever may be the proper "situs" of an ordinary breach-of-contract or unjust-enrichment claim, the courts below cannot be faulted for declining to hold that an unripe claim arising out of anticipated payment in Iran for services rendered in Iran by an Iranian company is somehow situated in the United States.

Moreover, recognizing that a rule looking only to whether the debtor is an American company would render the act of state doctrine "meaningless," petitioners apparently concede (Pet. 9; Reply Br. 4, 6) that the doctrine would bar their suit if respondent had assets in Iran at the time of the expropriation. Under petitioners' own theory, however, respondent *did* have assets in Iran at the time of the expropriation, because in their view the situs of a debt is the domicile of the debtor, and the situs of the debt that *Iran* owed *respondent* at that time therefore was in Iran. Indeed, Iran's power to decide whether to pay respondent the funds out of which the Consulting Firm would be paid, or to expropriate a portion of those funds, shows that Iran could exercise complete dominion over the Consulting Firm's contingent claim against respondent. At least in these unique circumstances, the court of appeals reasonably found that the expro-

priation of the Consulting Firm's claim (or respondent's debt) was complete in Iran.

2. Petitioners also urge (Pet. 17-20) the Court to grant certiorari to consider whether the courts below erred in not soliciting the views of the Executive Branch on the foreign relations impact of their suit before ordering it dismissed. But petitioners did not request the district court to solicit the views of the United States, and they requested the court of appeals to do so only after oral argument, first in a letter to the Clerk and then in their petition for rehearing. See Pet. 5; Br. in Opp. 9; Br. in Opp. App. 2a. Accordingly, it is not surprising that neither the panel opinion nor the order denying rehearing mentions the issue. Pet. App. 1a-11a, 13a. "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Because there is no indication that the court below gave consideration on the merits to soliciting the views of the Executive Branch (as opposed to disregarding petitioners' requests on grounds of tardiness), the Court should deny review on this issue, especially now that the Court has cured whatever defect there might have been by inviting the Solicitor General to file this brief.

The premise of petitioners' submission on this point is mistaken in any event. In arguing that the Executive Branch's views should have been solicited, petitioners rely (Pet. 17, 19-20; Reply Br. 9-10) on the court of appeals' observation that it would be a "slap in the face of the Iranian regime" for a United States court to entertain this suit. Pet. App. 10a-11a. Petitioners apparently read the quoted phrase to constitute a particularized judicial determination that adjudication of this suit would adversely affect the foreign relations of the United States. If the decision of the court of appeals actually turned on a particularized assessment of the foreign policy interests of the United States in its relations with Iran, we would agree—in accordance with the submission in our amicus brief (at 32-33) in *Kirkpatrick*, quoted by petitioners (Pet. 19)--that a court should not undertake to determine such matters for itself and should

instead solicit and give great weight to the views of the Executive Branch. But we think petitioners read far too much into a single phrase in the court of appeals' opinion. In context, it is clear that the court intended the quoted phrase to be nothing more than the most immediate illustration of the comity and separation of powers concerns that underlie the act of state doctrine as a general matter. See Pet. App. 10a-11a. This Court took account of such concerns in *Sabbatino*, 376 U.S. at 428-436, and the court of appeals was not barred from doing so here.

In a related vein, petitioners urge (Pet. 18-19) the Court to adopt a "reverse-*Bernstein*" approach to act of state cases, under which a suit would not be barred unless the Executive Branch interposed an objection in the particular case.[10] Petitioners concede (Pet. 18-19; Reply Br. 9), however, that the Court in *Sabbatino* specifically rejected that approach (376 U.S. at 436) and that they are essentially asking the Court to overrule *Sabbatino* in this regard. Petitioners advance no reason why the Court should do so. Moreover, contrary to petitioners' contention (Pet. 19; Reply Br. 8), we did not urge the Court in *Kirkpatrick* to reconsider this holding in *Sabbatino* (see U.S. *Kirkpatrick* Br. at 31-32 & n.32)—which the United States supported in *Sabbatino* itself—and we do not do so here.

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[10] In *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954), as understood by this Court in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the court of appeals recognized an exception to the act of state doctrine where the Executive Branch represented that application of the doctrine would not advance the interests of United States foreign policy. In *First National City Bank*, three Justices approved that approach. 406 U.S. at 768 (plurality opinion). Justice Powell, in his concurring opinion (*id.* at 773), and Justice Brennan, in his dissenting opinion for four Justices (*id.* at 776-777, 782-793), disapproved of a "*Bernstein* exception." See also *id.* at 773 (Douglas, J., concurring). Under a "reverse-*Bernstein*" approach, the court would have a duty to adjudicate in the absence of an Executive Branch representation that United States foreign policy interests would be adversely affected. See *Sabbatino*, 376 U.S. at 467-472 (White, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,
Petitioners,

v.

HARZA ENGINEERING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

Pursuant to the Court's Rule 15.7, petitioners hereby submit this supplemental brief in response to the brief of the United States as *amicus curiae*, filed June 12, 1990, in response to the Court's invitation.

If the brief of the United States proves anything, it is that the act-of-state doctrine has been thrown into considerable confusion by the decision in this case and that lower courts need this Court's guidance.

I. THE UNITED STATES HAS NOT EXPRESSED ANY FOREIGN-RELATIONS CONCERNS ABOUT THIS CASE BEING HEARD.

Nowhere does the brief of the United States identify any manner in which the foreign relations of the United

States would be injured by adjudicating this private debt action. In fact, as noted below, the Department of State has yet to express any foreign-relations concern about this case being heard. Yet that is the only reason a court would be justified, under the act-of-state doctrine, in declining to hear a case on the merits. *W.S. Kirkpatrick & Co., Inc.* v. *Environmental Tectonics Corp., Int'l*, 110 S. Ct. 701 (1990).

"Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them," *id.* at 707. Before a court decides not to consider a case on the merits because of the act-of-state doctrine, the "purposes" of the doctrine should, as the United States has emphasized (Br. 11), receive great weight. But those purposes are, as is agreed on all sides, to effectuate comity among nations and to respect the separation of powers—under which relations with foreign states are the responsibility of the Executive Branch. Integrating these two principles leads, we believe, to the conclusion that a lower court should not conclude that foreign relations will be injured without *something* to support that result, *cf. Kirkpatrick*, 847 F.2d at 1067.

We suggested that seeking the views of the Executive Branch should be an essential element of that determination whenever the case involves confiscation of intangible property.[1] The brief of the United States agrees

[1] The brief of the United States is in error when it says (p. 18) that it was "only after oral argument" that we asked the court of appeals to seek the views of the Executive Branch on whether any foreign-policy concerns would be raised by hearing the case on the merits. In fact, our first request was made on April 7, 1989, (*see* App. to Br. in Opp.), whereas oral argument occurred on May 17, 1989 (*see* Pet. App. 1a). The second request, in the form of a petition for rehearing, was submitted on August 30, 1989 (Br. in Opp. 9). Of course it was only then that the court of appeals had shown that it believed itself competent to make a foreign-policy determination as the basis for its decision.

with us (Br. 18-19), assuming we are correct in our assertion that the court of appeals bottomed its decision on its finding that adjudicating this case would injure this nation's relationship with Iran. The brief asserts (p. 19) that we have misread the statement in the opinion of the court of appeals that to deny recognition to Iran's confiscation of petitioners' claim would be "a slap in the face of the Iranian regime" (Pet. App. 10a). We do not know what else to make of that statement and the repeated—not isolated—use of the word "slap" in the succeeding lines in the opinion. The brief of the United States suggests that this was simply an "illustration" of the concerns that underlie the doctrine, noting that this Court similarly took account of such concerns in *Banco Naçional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428-36 (1964). The Court's discussion there, however, centered on the concept of territoriality and the virtual certainty that the foreign government would be offended if a court in the United States refused to recognize a confiscation of tangible property that had in fact been completed within the borders of the confiscating state. Where the property is intangible, as it is here, it has been known since Judge Friendly's 1965 decision in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), that courts in the United States do not recognize such confiscations when, there as here, the foreign government could not compel the American debtor to pay the debt. The Department of State has never, to our knowledge, asserted that hearing claims in this distinct line of decisions involving intangibles would cause foreign-relations difficulties.

If, then, we are right in our interpretation of the court of appeals decision, it follows that the decision was in error. Nowhere in the record of this case are the views of the Executive Branch found on the critical question: Would it injure the foreign relations of the United States to adjudicate this case on the merits?

Certainly those views are not contained in the brief of the United States in this Court.[2] Indeed, the brief completely ignores the clearest evidence that adjudication of this case on the merits would not adversely affect relations with the Iranian government—that government's utter disinterest in the roughly $2 million claim the lower courts have ruled that Iran owns (Pet. App. 9a, 28a). The likely result—which even the court of appeals acknowledged (Pet. App. 11a)—is a windfall for respondent with no corresponding benefit to the foreign relations of the United States.

To leave the lower court decision standing would therefore leave other courts to wonder how they are to go about deciding whether the "purposes of the act of state doctrine" call for dismissal of a case that is otherwise properly before them for adjudication.

II. WHERE THE DEBT WAS OWED BY AN AMERICAN COMPANY, THE SECOND AND FIFTH CIRCUIT DECISIONS HAVE NEVER TURNED ON WHETHER THE EVENTS THAT GAVE RISE TO THE DEBT HAD HAD ANY CONNECTION TO THE UNITED STATES.

We also agree with the United States that "concepts of territoriality" (Br. 14) have played and should play

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[2] It is the Department of State which has responsibility for determining foreign relations concerns related to cases in courts in the United States, and it is generally that Department which supplies the views of the Executive Branch to the courts on that kind of question, either through the Solicitor General or even directly in the lower courts, *see, e.g., Kirkpatrick*, 110 S. Ct. at 703-04. Unlike the brief of the United States as amicus curiae in *Kirkpatrick*, however, the brief of the United States in this case gives no evidence that it was subscribed to by the Department of State or that there is any foreign relations reason for not hearing this claim. Thus, it may not be correct to say that, because the Solicitor General has been invited to file a brief, any error of the lower courts in not inviting the Executive Branch to express its views *on whether the foreign relations of the United States would be injured by adjudication of this case* has been "cured" (p. 18).

an important role in determining when the act-of-state doctrine should cause a court to decline to adjudicate a case. *See, e.g., Kirkpatrick*:

> "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign *performed within its own territory*."

110 S. Ct. at 704 (emphasis added). This has led the Second and Fifth Circuits to develop a set of workable principles (not a "rigid, debtor-oriented rule" (Br. 14)) for deciding when the doctrine should apply in cases where a debt owed by an American is confiscated: When the debtor is not under the dominion of the confiscating state, residence of the debtor in the United States is a sufficient basis not to apply the doctrine (Pet. 8-10).

The United States elaborately discusses the prior decisions of those Circuits but finds significance in facts to which the decisions' authors attached no significance. In none of the cases did the decision turn on whether the events that gave rise to the debt had had any connection to the United States.

The genesis is *Republic of Iraq, supra*. It involved two kinds of intangible property: a deposit in a New York bank and shares of a *Canadian* investment trust. 353 F.2d at 49. There is no indication anywhere in Judge Friendly's opinion that either the deposit or the shares had any connection with the United States, nor did he attach any significance to whether there had been any such prior connection.[3] He found the sole dispositive fact to be that "only a court in the United States"—and not an Iraqi court—"could compel the bank to pay the balance in the account or to deliver the certificates it

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[3] A bank deposit, of course, is nothing but a debt. *See* Vladikavkazky v. New York Trust Co., 189 N.E. 456, 459 (1934).

held in custody." *Id.* at 51. For this reason, and no other, the court held that the confiscation need not be given effect.

In the other cases, although the statement of the facts sets forth some prior connection to the United States, not a single opinion gives the slightest hint that such a connection had any bearing on the decision. Instead, the cases *uniformly* state that the dispositive issue was the same one that underlay *Republic of Iraq*—whether the confiscating state could fully carry out the confiscation within its own borders (Pet. 9-10). This has always turned on whether the American debtor had property in the confiscating state or could for some other reason be sued there.[4]

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[4] We strongly disagree with the United States when it says (pp. 12-13) that these courts might now be following a different rule, citing Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985), and Allied Bank Int'l v. Banco Credito Agricola, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). In the first place, the Fifth Circuit in *Callejo* explicitly stated that the case before it, which involved a foreign state's confiscation of a debt owed *by one of its nationals*, presented different act-of-state considerations from those that apply when the debt is owed by an American, although it went on to note that applying the analysis developed in those cases would not have led to a different result in the case before it. 764 F.2d at 1123-24. The same is true for the Second Circuit in *Allied*, and in addition, the Second Circuit's *Bandes* decision, which came down three years after *Allied* (and which involved a debt owed by an American), did not even cite *Allied* and gave no hint that the court was departing in any way from its longstanding mode of analysis in such cases. Bandes v. Harlow & Jones, Inc., 852 F.2d 661 (2d Cir. 1988).

Likewise, this Court's decision in Dames & Moore v. Regan, 453 U.S. 654 (1981), involved claims against a foreign state, not against American debtors. In any event the Court was at pains to emphasize that, owing to the unusual need for a rapid decision, the case should not be taken to have decided any more than what was actually at issue, 453 U.S. at 660-61, 688, and the act-of-state doctrine was not at issue there.

It was thus surprising to read the court's conclusion in *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333 (9th Cir. 1985), that Iran, the confiscating state, could fully carry out the confiscation in Iran because of Iran's connection with the Iranian creditor and the work that gave rise to the debt:

> "Tchacosh was incorporated under the laws of Iran. The subcontract in issue was to be performed wholly within Iran. Iran retains any work completed. Payment was to be invoiced and made to Rockwell's office in Teheran. Disputes arising under the subcontract were to be resolved under Iranian law."

766 F.2d at 1338. The court never explained how these facts support the conclusion that the confiscation could be carried out in Iran. Nor does the lower court in this case or the brief of the United States supply that explanation. In fact, Iran cannot carry its confiscation to its logical conclusion except by seeking a remedy in the courts of the United States.

The United States, although professing to favor "workable rules and principles" that lower courts have developed (p. 10), proceeds to recommend the exact opposite—an amorphous "interest analysis" drawn from an area of law ("modern conflict-of-laws principles") that addresses an entirely different set of concerns.

Whatever the intellectual appeal of an "interests analysis," such an approach certainly provides very little assistance to lower courts (and to those who read decisions in an effort to guide clients).[5] For example, one

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[5] The authors cited by the United States (Br. 13) have themselves been critical of this mode of analysis insofar as it seeks to determine the relative interests of two or more states (in the United States). For example, they say:

> "Since the rules being interpreted seldom included any answer to the conflicts problem . . . the interpretative process reduced itself to a freewheeling analysis of governmental purposes and functions . . . . Subjective reactions were inevitable. Govern-

of the key facts the *Tchacosh* court took into account was that the parties there had agreed that Iranian law should apply. 766 F.2d at 1338. Here the parties agreed that Illinois law should apply, but the United States brushes this fact off as insignificant (Br. 15 n.8), and does so without explaining how courts are supposed to weigh the various allegedly relevant facts in making their determination.

In any event, such an approach would not respect "the underlying purposes of the act of state doctrine," as the United States claims (p. 14). If the object of the "interest analysis" is to assist in determining when adjudication of a case will give offense to a foreign sovereign, that would involve the courts in making the very foreign policy judgments that the act-of-state doctrine is meant to avoid. Moreover, the evident purpose of the analysis, as witness its application in this case and in *Tchacosh*, is to expand the application of the act-of-state doctrine, which means that more foreign confiscations will be given effect by courts in the United States, more litigants will be deprived of access to those courts, and more American debtors will enjoy the benefit of not paying debts they owe. How such results are consistent with the act-of-state doctrine is nowhere explained.

In short, there is plainly a conflict in approach here. Had this case come up in the Second Circuit or the Fifth Circuit, the analysis would have been different and the result would have been exactly the opposite from what transpired in the court below.

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mental interest could, in the hard cases, be discovered by one analyst and denied by another."

R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* § 91, at 267 (1986). Indeed, the kind of weighing process that this analysis can involve is, say the authors, "essentially political in character, a job for legislatures and not for courts." *Id.* at 268 (citing Professor Brainerd Currie).

CONCLUSION

The Court should grant the petition for certiorari in order to resolve the conflict among the circuits and to explain how courts are to resolve act-of-state claims involving confiscations of debts owed by Americans.

Respectfully submitted,

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